Supreme Court, U.S.
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No. 95-

In The

Supreme Court of the United States

October Term, 1995

J. BURK VOIGT,

Petitioner,

v.

RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON, STEPHANIE COLE, ARTHUR SNOWDEN II, AND STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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93 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Where an individual alleges that he was discharged from public employment in retaliation for having exercised his First Amendment rights of free speech on matters of public concern, and the public employer moves for summary judgment based on the purported justification that the individual was discharged for reasons that do not or do not sufficiently involve matters of public concern, does the individual defeat the employer's motion for summary judgment where the individual makes a substantial factual demonstration that the public employer failed to reasonably investigate matters prior to rendering its decision and that the public employer's proffered justification is pretextual so that the trier of fact can reasonably infer that the individual was actually discharged in retaliation for having exercised his rights of free speech on a matter or matters of public concern?

(2) Where an out-of-state resident is hired for a managerial position in public employment so that he is in the position to hire other out-of-state residents, and that individual subsequently moves to the state but continues to be perceived as an out-of-state resident, is severely criticized for hiring a most qualified person from out-of-state, and then engages in free speech concerning the public employer's invidious discrimination against out-of-state residents, after which the individual is promptly terminated from public employment, does the individual have standing to bring an action against the public employer under 42 U.S.C. § 1985(3)?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported as *Voigt v. Savell*, 70 F.3d 1552 (9th Cir. 1995). A copy of the Court of Appeals' decision is set forth at Appendix A. (App. 1-26)

The decision of the United States District Court has not been reported. A copy of that decision is set forth at Appendix B. (App. 27-38)

JURISDICTION OF THE COURT

The Court of Appeals rendered its decision in this case on November 22, 1995. On February 9, 1996, the Honorable Justice Sandra Day O'Connor granted Petitioner J. Burk Voigt an extension to and including March 21, 1996 in which to file a petition for writ of certiorari.

Since Petitioner's case involves a controversy pertaining to rights and remedies under Article IV, §2, Clause 1 of the United States Constitution, the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1983 and 1985(3), this Court has jurisdiction under 28 U.S.C. § 1254(1) to review via writ of certiorari the decision of the United States Court of Appeals.

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES INVOLVED IN THE CASE

This case involves the following constitutional provisions, statutes, and court rules. Since the provisions are

lengthy, pursuant to Supreme Court Rule 14.1(f), the pertinent text is set forth at Appendix C (App. 39-44):

The United States Constitution, Article III, §2, Clause 1;

The United States Constitution, Article IV, §2, Clause 1;

The United States Constitution, Amendment I;

The United States Constitution, Amendment XIV, § 1;

42 U.S.C. § 1983;

42 U.S.C. § 1985(3); and

Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

J. Burk Voigt was hired on July 17, 1989 by then-presiding Judge Mary E. Greene to be the Clerk of the Court and the Assistant Area Court Administrator for the Fairbanks trial courts in the State of Alaska Court System. Because Voigt was not an Alaska resident at the time, his hiring generated considerable controversy within the state, including within the Alaska Legislature and within the court system itself. Although Voigt became a permanent tenured employee one year later, he continued to be perceived as an out-of-state resident during the remainder of his employment with the court system. (App. 3, 64-65)

In January of 1991, Judge Richard D. Savell assumed the duties of presiding judge. Shortly thereafter, Judge Savell sought to hire a new Fairbanks Area Court Administrator (ACA). After interviewing four individuals for

the position, Judge Savell first offered the position to Judith Cramer, who declined the offer. Judge Savell then offered the position to Don Mills, who accepted the position on Friday, April 26, 1991. The following Monday, Cramer called Judge Savell and informed him that she had changed her mind and now wanted the position. After contacting several judges, not all of whom indicated their approval, and then speaking with Arthur Snowden, the Administrative Director of the Alaska Court System, Judge Savell notified Mills that his employment agreement had been cancelled. Judge Savell offered the position again to Cramer. (App. 4-5)

Voigt was critical of the way Judge Savell handled the ACA hiring and of the integrity and competency of Cramer. Voigt expressed his concerns at a meeting of various department heads of the Fairbanks court system on May 1, 1991. On May 15, 1991, Voigt received a written reprimand from Judge Savell for Voigt having expressed his concerns at the May 1 meeting. Although Voigt did not agree with the reprimand, he chose not to grieve it. In the end, Cramer once again changed her mind and never commenced the job as ACA, and Ronald Woods became ACA and thus Voigt's immediate superior in November of 1991. (App. 5-6, 53-54)

The next year, on February 7, 1992, Voigt hired Margaret Crawford, a non-resident of Alaska, for a court clerk position. Voigt chose Crawford over Roberta Demoski, a court clerk from Galena, Alaska, on the basis that Crawford – one of Judge Savell's former law clerks – was best qualified for the position in view of her legal experience, education, and personality. (App. 6)

Demoski, an Alaska Native, filed an informal grievance alleging that the hiring decision was racially motivated. Ronald Woods found the grievance to be without basis and thus affirmed Voigt's decision. However, on February 25, 1992, Judge Savell overruled Woods and Voigt and upheld Demoski's grievance. (App. 6-7, 54)

Voigt discussed Judge Savell's decision to uphold Demoski's grievance with at least five or six other court employees. Voigt expressed his concern that Judge Savell was retaliating against him for having stated his criticism of the Cramer/Mills ACA hiring. Voigt also voiced his concerns that in violation of both state and federal law Judge Savell and other members of the Alaska Court System were practicing a policy of discriminating against nonresidents in hiring for public employment. (App. 7)

Shortly thereafter, on March 24, 1992, Voigt received a letter from Judge Savell and Ronald Woods indicating that Savell and Woods intended to dismiss Voigt from his position. (App. 7, 67-74) A hearing was held, and Voigt was formally terminated on March 27, 1992. Voigt then began pursuing the court system's grievance procedure. However, when it became apparent to Voigt that he was unlikely to receive a fair and impartial hearing within the Alaska Court System itself, Voigt filed an action in the United States District Court on April 17, 1992. (App. 7) Voigt named as defendants Judge Savell and the other Respondents. Since Voigt's action alleged violations of his rights under the Privileges and Immunities Clause (Article III, § 2, Clause 1 of the United States Constitution), the First and Fourteenth Amendments to the United States Constitution, and the corresponding civil rights statutes 42 U.S.C. §§ 1983 and 1985(3), the United States District

Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

In the United States District Court, the defendants moved for summary judgment on Voigt's claims. In response to the summary judgment motion, among the evidence which Voigt presented was an affidavit from the senior sitting judge, Jay Hodges (App. 52-56), and three affidavits from an expert in personnel management, Dr. John N. Taylor of the University of Alaska Fairbanks, who reviewed and analyzed the Alaska Court System Personnel Rules, Voigt's personnel file, the pertinent decisional documents, and other materials generated during the course of matters (App. 45-51, 57-66).

In Judge Hodges' affidavit, he stated that of the four Clerks of Court during Judge Hodges' 15-year tenure, "Voigt was head and shoulders above the others in his professionalism as an administrator and in seeing that the Clerk's Office ran smoothly and efficiently." (App. 53) Judge Hodges added that when Voigt was Clerk of Court, Voigt's performance was outstanding and the office morale and friendliness were "at an all-time high" but had deteriorated since Voigt was fired. (App. 53, 55-56) Judge Hodges, however, warned that certain members of the courthouse bureaucracy were threatened by Voigt's improvements because "[t]hey did not like being accountable for their own actions." (App. 53)

In addition, Judge Hodges indicated his puzzlement that no one from the court system had ever asked him for his views or knowledge of the dispute. Also, Judge Hodges expressed amazement that Ronald Woods had signed Voigt's termination letter because Woods had told Judge Hodges that Judge Savell's decision to uphold the

Demoski grievance was not based on objective facts but was instead a politically-correct response to a baseless allegation of discrimination, that Arthur Snowden had expressed to him (Woods) that one should hire Alaskans and not residents from other states, and that – even after Voigt was fired – he (Woods) had no problem whatsoever with Voigt's work performance. (App. 54-56)

In his affidavits, Dr. Taylor examined the situation in detail. In essence, Dr. Taylor confirmed the accuracy of Judge Hodges' affidavit and concluded that Voigt's personnel file contained no disciplinary documents or actions other than the one May 15, 1991 reprimand by Judge Savell and, after the reprimand, contained consistently-above-average performance evaluations – even by Judge Savell. Dr. Taylor also concluded that in firing Voigt the court system had failed to conduct a reasonable investigation and review prior to rendering the dismissal decision, had failed to follow its own rules of progressive and constructive discipline, had inappropriately disciplined Voigt twice for his concerns about the Cramer/Mills ACA hiring, had evidenced an insidious and secretive conspiracy to prevent residents from other states from being hired for court system positions, and had engaged in a pattern of result-oriented, *post-hoc* fact gathering, all which strongly indicate that the termination of Voigt was done in bad faith and that the justifications for the termination offered by the court system are pretextual. (App. 45-51, 57-66)

Despite the evidence, the United States District Court, Judge James K. Singleton, Jr., granted summary judgment to the defendants. (App. 27-38) Although Judge Singleton acknowledged that the defendants had failed to follow personnel rules in dismissing Voigt (App. 37 n.4), Judge Singleton held, *inter alia*, that Voigt did not have

standing to assert a claim under 42 U.S.C. § 1985 (3) and that Voigt's speech did not involve a matter of public concern. (App. 35-37)

Voigt appealed Judge Singleton's decision to the United States Court of Appeals, which affirmed Judge Singleton. (App. 1-26) In rejecting Voigt's First Amendment claim, the Court of Appeals concluded – contrary to the affidavit of Judge Hodges – that there was undisputed evidence that Voigt's expressed concerns about the Cramer/Mills ACA hiring had damaged office morale and harmony. (App. 13) While the Court of Appeals recognized that it must be concerned with pretext in the explanation offered by the public employer (App. 12), the Court of Appeals attached no evidentiary significance to the timing and wrongfulness of Voigt's dismissal (App. 13, 17-18) and apparently ignored the detailed evidence of pretext presented in and with the affidavits of Judge Hodges and Dr. Taylor (App. 45-66). Thus, although the Court of Appeals held that Voigt did engage in speech involving matters of public concern, the Court of Appeals accepted the defendants' version and explanation of events as being factually conclusive and held that on balance the defendants' interest in avoiding the purported disruption in the workplace outweighed Voigt's First Amendment interest. (App. 11-18)

As to Voigt's claim under 42 U.S.C. § 1985(3), the Court of Appeals held that Voigt had neither primary nor third-party standing to pursue such an action. The Court of Appeals reasoned that since the class at issue is non-residents of Alaska, Voigt did not have primary standing because he had become an Alaska resident by the time of his dismissal and did not have third-party standing

because his position to hire non-residents as employees of the Alaska Court System did not establish a sufficiently close relationship with the non-residents. (App. 21-24)

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the United States of Appeals for the Ninth Circuit has decided important federal questions in a way that conflicts with applicable decisions of this Court and also conflicts with applicable decisions of other United States Courts of Appeals on the same important matter.

For one, the Court of Appeals has incorrectly minimized the importance of the matters of public concern on which Voigt engaged in speech, and has thus improperly balanced Voigt's speech interest against the public employer's interest. Discrimination against non-residents which prohibits them from obtaining public employment is a matter of great public concern, and is the type of discrimination which Alaskans and the State of Alaska have previously demonstrated a distinct proclivity to practice. *See United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 218-21, 104 S.Ct. 1020, 79 L.Ed.2d 249, 259-61 (1984) (discussing but not deciding whether public employment is a fundamental right under the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (striking down "Alaska Hire" statute as violation of Privileges and Immunities Clause); *cf. Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2852, 37 L.Ed.2d 853 (1973) (state statute which

prohibits non-citizens of the United States from obtaining civil service employment violates equal protection). Indeed, speech exposing or discussing illegal discrimination in the halls of justice involves matters of paramount public concern. *Cf. Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

Moreover, the Court of Appeals' affirming of the grant of summary judgment on Voigt's First Amendment claim is in direct conflict with several aspects of this Court's decision in *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). For example, the Court of Appeals neglects to address the public employer's failure to have engaged in a reasonable investigation and corresponding failure to have taken reasonable care before deciding to dismiss Voigt. *See Waters*, 511 U.S. at ___, 114 S.Ct. at 1889-90, 128 L.Ed.2d at 700-02.

In addition, contrary to *Waters*, the Court of Appeals has affirmed the grant of summary judgment despite the existence of genuine factual disputes as to which speech formed the basis for Voigt's dismissal, as to whether that speech was or was not disruptive, as to whether the public employer reached its conclusions in good faith, and as to whether the stated basis or bases for Voight's dismissal are a mere pretext covering the public employer's actual motivation. *Waters*, 511 U.S. at ___, 114 S.Ct. at 1889-91, 128 L.Ed.2d at 700-04; *id.*, 511 U.S. at ___, 114 S.Ct. at 1891-93, 128 L.Ed.2d at 704-06 (Souter, J., concurring). In view of the substantial evidence of pretext presented in this case, there still needs to be a "[j]udicial inquiry into the genuineness of [the] public employer's asserted permissible justification." *Waters*, 511 U.S. at ___,

114 S.Ct. at 1895, 128 L.Ed.2d at 709 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in the judgment).

Given that Voigt's dismissal followed close on the heels of his statements concerning illegal discrimination in the hiring process, coupled with Voigt's exemplary personnel record, Judge Savell's prior hostility toward Voigt for Voigt's speech concerning the Cramer/Mills ACA hiring, and the public employer's failure to follow its own rules concerning constructive and progressive discipline, at the very least a factual dispute exists whether the public employer honestly believed that "the discipline chosen is an appropriate, and not excessive, response to the employee's speech as reported." *Waters*, 511 U.S. at ___*, 114 S.Ct. at 1872*, 128 L.Ed.2d at 705* (Souter, J., concurring).

In regard to Voigt's standing to assert a claim under 42 U.S.C. § 1985(3), consistent with the plain language of the statute, this Court has held that a person bringing suit does not have to be a member of the class to which the conspiracy directs its invidious animus; rather, any person who is injured in person or property by the conspiracy has standing to bringing an action for damages under 42 U.S.C. § 1985(3). *United Brotherhood of Carpenters and Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 827, 103 S.Ct. 3352, 77 L.Ed.2d 1049, 1053 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 29 L.Ed.2d 338, 348-49 (1971).

A person has standing under 42 U.S.C. § 1985(3) if the defendants acted because of that person's association with or advocacy or support of the protected class. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. ___, ___,

113 S.Ct. 753, 759, 122 L.Ed.2d 34, 45-46 (1993); *see also Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2nd Cir. 1982), *cert. denied*, 459 U.S. 857, 103 S.Ct. 127, 74 L.Ed.2d 110 (1982); *Richardson v. Miller*, 446 F.2d 1247, 1248-49 (3rd Cir. 1971); *Novotny v. Great American Savings and Loan Association*, 584 F.2d 1235, 1244-45 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979); *Scott v. Greenville County*, 716 F.2d 1409, 1415 (4th Cir. 1983); *cf. Carpenters, supra*, 463 U.S. at 851 n.16, 103 S.Ct. 3352, 77 L.Ed.2d at 1069 n.16 (Blackmun, J., joined by Brennan, Marshall, and O'Connor, JJ., dissenting) (the legislative history of § 1985(3) "indicates classes that in particular circumstances or in geographic regions might qualify for protection because of their vulnerability"); *Browder v. Tipton*, 630 F.2d 1149, 1151-52 (6th Cir. 1980) (sectional animus comes within the ambit of 42 U.S.C. § 1985(3)).

In addition, since state agents are involved in the conspiracy in Voigt's case, and also since the aim of the conspiracy is to influence state activities, any injury the conspiracy inflicted on Voigt for exercising his First Amendment rights is actionable under 42 U.S.C. § 1985(3). *Carpenters, supra*, 463 U.S. at 830, 103 S.Ct. 3352, 77 L.Ed.2d at 1055.

Finally, as to a third-party standing, Voigt – as the person who is already in distant Alaska, and as the person who makes the hiring decisions and is otherwise intimately familiar and connected with the workings of the court system, and as one who is perceived as a *de facto* non-resident – would often be "the only effective adversary" of the court system's discriminatory policies and practices. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 24 L.Ed.2d 386, 392-93 (1969). Thus, even if Voigt did not have primary standing under 42

U.S.C. § 1985(3), he must nonetheless be deemed to have third-party standing.

CONCLUSION

For all the reasons stated, Petitioner J. Burk Voigt respectfully prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DATED at Fairbanks, Alaska this 21st day of March, 1996.

Respectfully submitted,

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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

J. BURK VOIGT,

Petitioner,

v.

RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON, STEPHANIE COLE, ARTHUR SNOWDEN II, AND STATE OF ALASKA,

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APPENDIX A

J. Burk VOIGT, Plaintiff-Appellant,

v.

Richard D. SAVELL; Ronald J. Woods; Karrold Jackson; State of Alaska, Defendants-Appellees.

No. 94-35721.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 13, 1995.

Decided Nov. 22, 1995.

Robert John and J. Burk Voigt, Fairbanks, Alaska, for plaintiff-appellant.

Frank S. Koziol, Anchorage, Alaska, for defendants-appellees.

Appeal from the United States District Court for the District of Alaska.

Before: WRIGHT, ALARCON and CANBY, Circuit Judges.

OPINION

ALARCON, Circuit Judge:

J. Burk Voigt appeals from the dismissal of this action against Richard D. Savell, Presiding Judge of the Fourth Judicial District of the Alaska Court System, and several

senior members of the Alaska Court System's administrative staff.[1] Voigt contends that the district court erred in granting summary judgment in favor of the defendants on his claims under 42 U.S.C. § 1983 for unlawful discharge in violation of his First Amendment right to free speech and his Fourteenth Amendment right to procedural due process. He further contends that the district court erred in granting summary judgment in favor of the defendants on his claim under 42 U.S.C. § 1985 in which he alleges that the defendants conspired to discriminate against non-residents of Alaska when hiring court personnel.

We affirm the district court's judgment. With regard to the First Amendment claim, an application of the balancing test articulated in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), leads us to conclude that Voigt's speech is not entitled to constitutional protection in the context of his wrongful discharge action. We need not reach the merits of the Fourteenth Amendment claim because, in the district court, Voigt expressly abandoned his claim that the defendants violated his federal procedural due process rights. We affirm

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[1] In addition to Judge Savell, Voigt lists as defendants: Ronald J. Woods, Area Court Administrator for the Fourth Judicial District; Arthur Snowden II, Administrative Director of the Alaska Court System; Stephanie Cole, Deputy Administrative Director of the Alaska Court System; and Karrold Jackson, Personnel Director of the Alaska Court System. Voigt also names the state of Alaska as a defendant. The district court ruled that Voigt's claims for damages against the state are barred by the Eleventh Amendment. Voigt does not appeal from the dismissal of the State of Alaska on this ground.

the district court's judgment on Voigt's section 1985(3) claim because Voigt does not have standing to assert this claim.

I

Voigt was hired on July 17, 1989 by the Alaska Court System as the Clerk of the Court and Assistant Area Court Administrator for the Fairbanks trial courts. He became a permanent tenured employee one year later. Voigt's relationship with Judge Savell can best be described as strained from at least as early as January of 1991. On January 15, 1991, shortly after assuming his duties as the new presiding judge, Judge Savell sent two memoranda to Voigt expressing concerns about the way in which Voigt was carrying out his responsibilities. One of these memoranda stated that an action Voigt had taken had not been authorized and was "a real blunder." Voigt responded on January 17, 1991, with a memorandum to Savell, in which he addressed what he considered "the development of a very serious impediment to our relationship." In this memorandum, Voigt expressed confusion as to why Judge Savell considered him to be "the bad guy" with regard to various situations in the office and stated that "[w]hile your target may have been me personally, your indiscriminate and general comments deny the tremendous accomplishments my office has made[.]"

On March 24, 1992, Voigt received an intent-to-dismiss letter signed by defendants Savell and Woods. The five-page letter sets forth, as one of the reasons for Voigt's termination, his "consistent pattern of making

inappropriate statements to subordinate employees[,]" such as "statements to supervisors and other court employees designed to torpedo the selection of Judith Cramer as [a court administrator]." The letter also states that Voigt had engaged in insubordinate behavior, citing Voigt's criticism of Judge Savell's decision to uphold a grievance filed by Roberta Demoski, a resident of Alaska who complained when Voigt did not hire her for a clerk position.[2] Because Voigt relies on his speech regarding these two incidents as the basis for his First Amendment claim, we set forth the facts surrounding these incidents in detail.

In early 1991, Judge Savell sought to hire a new Fairbanks Area Court Administrator ("ACA"). After interviewing four individuals for the position in mid-April, he first offered the position to Judith Cramer, an Ohio resident and that state court's administrator. Cramer declined the position. On Friday, April 26, 1991, Judge Savell offered the ACA position to Don Mills, an Oregon resident and that state court's administrator. Mills accepted the position. The following Monday Cramer called Judge Savell and indicated that she had changed her mind and wanted to accept the position.

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[2] Several other grounds for termination were listed in the intent-to-dismiss letter. For instance, the letter lists eight separate instances in which Voigt is purported to have made inappropriate statements or engaged in inappropriate actions in dealing with subordinate employees. The letter also states, among other things, that Voigt "misused court resources for improper or harmful purposes[,]" and "violated Personnel Rule 6.05 governing overtime compensation."

Judge Savell consulted by telephone with every judge he could find in the district in order to obtain their consent to the cancellation of Mills' employment contract so he could award the position to Cramer. Every judge whom Judge Savell contacted approved of the proposed action, except for Judge Jay Hodges. Judge Savell then called Art Snowden, the Administrative Director of the Alaska Court System. Snowden approved the proposed action and authorized reimbursement to Mills for any losses or expenses he had incurred as a result of the recision of the agreement to employ him. Judge Savell notified Mills that the employment agreement had been cancelled and offered the position to Cramer.

Voigt was highly critical of the way Judge Savell handled the ACA hiring and of Judith Cramer, the person Judge Savell had chosen for the position. At a supervisor's meeting attended by the various department heads of the Fairbanks court system on May 1, 1991, Voigt stated that Judge Savell "lacked honor and integrity" in his handling of the situation. He also questioned Judith Cramer's integrity and competency.

Voigt received a written reprimand on May 15, 1991 from Judge Savell. Judge Savell stated as one of the reasons for the reprimand Voigt's criticism to other staff members concerning the manner in which Judge Savell handled the hiring of Judith Cramer. Judge Savell informed Voigt that his comments went beyond mere disagreement with the decision to hire Cramer and the manner in which the selection was handled. He indicated that Voigt's comments appeared to be an attempt to "torpedo" the selection of Judith Cramer and to undermine

any chance that she had of succeeding at her job.[3] Voigt testified at his deposition that he did not agree with the reprimand, but chose not to grieve it.

The second incident Voigt relies on as the basis for his First Amendment claim involves his criticism of a decision by Judge Savell to uphold a grievance filed by Roberta Demoski. On February 7, 1992, Voigt hired Margaret Crawford, a non-resident of Alaska, for a court clerk position, instead of Demoski, a court clerk from Galena, Alaska. Voigt testified that he hired Crawford, one of Judge Savell's former law clerks, because he felt that her legal experience, education, and personality best qualified her for the position.

Demoski filed an informal grievance following Voigt's decision. Judge Savell issued a decision on February 25, 1992, in which he concluded that Demoski's grievance was valid. He found that Voigt had applied improper criteria and had ignored a personnel rule when choosing Crawford over Demoski. Judge Savell ordered

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[3] In pertinent part, the May 15, 1991 reprimand reads:

> Your recent actions in dealing with court system employees locally have spread disharmony and have operated to undermine my attempts to improve case handling and cure some of the serious problems that we face. You may disagree with the decision I made in the selection of an Area Court Administrator, and you may likewise disagree with the manner in which I made that selection. Beyond disagreement, however, your actions appear to have been designed to torpedo my selection of Judith Cramer and to undermine any chance she has of being accepted in the building and succeeding at her job. . . .

that Demoski be transferred to the Fairbanks clerk's office so she could be placed in the first available position for which she was qualified.

Voigt discussed Judge Savell's decision to uphold Demoski's grievance with at least five other court employees. He expressed his concern that Judge Savell was motivated to issue the decision because he was "out to get" him, especially since Voigt had spoken out regarding the Cramer/Mills incident. Voigt also speculated that Judge Savell and possibly other members of the court practiced an unspoken policy of discriminating against non-residents of Alaska who apply for positions with the court system. He voiced this concern to at least one other court employee. Voigt never expressed his concern over the allegedly discriminatory hiring practices to the media or to any person who was not a court employee.

After receiving the intent-to-dismiss letter on March 24, 1992, Voigt requested a pre-termination hearing. The hearing was held on March 26, 1992, by Judge Niesje J. Steinkruger. The following day, Judge Steinkruger issued a decision in which she found reasonable grounds to believe that the charges against Voigt were true and supported the proposed action of termination of employment. Voigt was formally terminated on March 27, 1992.

Voigt pursued the Alaska Court System's formal grievance process which provides for an investigation by the Administrative Director's office. The investigator upheld Voigt's termination. Voigt did not pursue the next step in the court system's grievance process which provides for a hearing before a hearing officer because he felt he was unlikely to receive a fair and impartial hearing.

II

Voigt filed this action on April 17, 1992. The defendants filed a motion for partial summary judgment on August 9, 1993, seeking dismissal of all of Voigt's federal claims. The district court granted partial summary judgment in favor of the defendants on Voigt's federal claims and entered judgment dismissing all of Voigt's claims on June 20, 1994. Voigt's state claims were dismissed without prejudice to further proceedings in state court.

III

Voigt asserts that the defendants failed to comply with the merit principles mandated by the Alaska Constitution, Alaska statutes, and the court system's personnel rules in terminating his employment. In addition, Voigt asserts that there were numerous procedural deficiencies with the way in which he was terminated, such as the defendants' failure to provide constructive and progressive discipline as required by the personnel rules. Finally, Voigt asserts that the defendants violated his First and Fourteenth Amendment rights and conspired to violate the constitutional rights of non-residents of Alaska.

We review a district court's grant of summary judgment de novo. *Home Sav. Bank v. Gillam*, 952 F.2d 1152, 1158 (9th Cir.1991). Summary judgment is appropriate if, with the evidence viewed in the light most favorable to the non-moving party, no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. *Id.*

Though "a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment[ ] . . . the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.' " *Connick v. Myers*, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983) (quoting *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734). Therefore, when a public employee asserts that he or she was discharged in retaliation for speech, "[o]ur responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government" without compromising the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143, 147, 103 S.Ct. at 1688, 1690.

The threshold question in determining whether a public employee's termination violates the First Amendment is whether the employee's speech is entitled to constitutional protection. *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir.1989). Voigt's speech is not protected in the context of public employment unless it involves a matter of public concern. *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689. "The inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7, 103 S.Ct. at 1691 n. 7.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S.Ct. at 1690. Employee expression that can be fairly considered as relating to a

matter of political, social, or other concern to the community may be characterized as speech involving a matter of public concern. *Id.* at 146, 103 S.Ct. at 1689.

In *Connick*, an assistant district attorney opposed her proposed transfer to a different section of the criminal court. *Id.* at 140, 103 S.Ct. at 1686. She circulated a questionnaire soliciting the views of her fellow staff members concerning office policies, office morale, the level of confidence in certain named supervisors, and whether employees felt pressured to work in political campaigns. *Id.* at 141, 103 S.Ct. at 1687. The Supreme Court held that most of the questions in the questionnaire did not involve matters of public concern. *Id.* at 148, 103 S.Ct. at 1690-91. The Court reasoned that questions regarding office morale and policies did not relate to the performance of the district attorney as an elected official, nor did the assistant district attorney seek to inform the public that the district attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. *Id.* Instead, the questions relating to internal office issues were characterized as "mere extensions of [the petitioner's] dispute" with her supervisors over her transfer to another section. *Id.*

The Supreme Court concluded that the question whether any assistant district attorney ever felt pressured to work in political campaigns "touched upon a matter of public concern" because there is a "demonstrated interest in this country that government service should depend upon meritorious performance rather than political service." *Id.* at 149, 103 S.Ct. at 1691.

The Court's analysis of the facts in *Connick* is instructive to our resolution of the question whether Voigt's speech involved a matter of public concern. Voigt's comments consisted primarily of criticism regarding the way Judge Savell handled two internal personnel matters. Such information carries little public import in that it does not seek to inform the public of Judge Savell's failure to discharge his duties as a judicial officer. Rather, as in *Connick*, Voigt's speech regarding the ACA hiring and the Demoski grievance can be characterized primarily as an extension of his personal dispute with Judge Savell in which Voigt attempted to galvanize support for himself by weakening staff support for Judge Savell. *See McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983) ("Speech by public employees may be characterized as *not* of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies.") (emphasis added); *see also Havekost v. U.S. Dept. of Navy*, 925 F.2d 316, 318-19 (9th Cir.1991) (independent licensee's petition to other licensees calling for the ouster of their representative due to disagreements over "minutiae of workplace grievances" contained no hint of a matter of public concern).

We cannot say, however, that Voigt's speech is of absolutely no relevance to the public's evaluation of the performance of the court system. The public has an interest in knowing whether the court treats its job applicants fairly. *See McKinley*, 705 F.2d at 1114 (speech concerning information needed by members of society to make

informed decisions about the operation of their government warrants First Amendment protection). Because Voigt's speech referred to unfair discrimination against non-residents of Alaska, and to unfair treatment of job applicants in general, it can be characterized as touching on a matter of public concern. Thus, though we find that Voigt's speech primarily involved his personal disputes with Judge Savell, we cannot say that it was utterly devoid of public concern.

Because Voigt's speech touched on a matter of public concern, we must balance Voigt's interest, as a citizen, to comment on such matters, against the defendants' interest, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734. "[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick*, 461 U.S. at 150, 103 S.Ct. at 1692. Given the limited way Voigt's speech touched on issues of public concern, the defendants' burden should not be unduly onerous. *Id.* Nevertheless, a "real, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views." *McKinley*, 705 F.2d at 1115.

The *Pickering* analysis requires particularized balancing based on the unique facts presented in each case. *Connick*, 461 U.S. at 150, 103 S.Ct. at 1691-92. The Supreme Court has explicitly declined to " 'attempt to lay down a general standard' " for determining when a public employer's interest outweighs the employee's First Amendment interest due to the " 'enormous variety of

fact situations in which critical statements by [ ] public employees may be thought by their supervisors [ ] to furnish grounds for dismissal[.]' " *Id.* at 154, 103 S.Ct. at 1694 (quoting *Pickering*, 391 U.S. at 569, 88 S.Ct. at 1735). Thus, we reject Voigt's argument that the defendants are unable to demonstrate that Voigt's speech was sufficiently disruptive simply because Voigt was not discharged immediately after he engaged in his speech.

The *Pickering* analysis requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. *Connick*, 461 U.S. at 150, 103 S.Ct. at 1691-92. For instance, the state may be justified in terminating the employee where the discharge is necessary to maintain "discipline by immediate superiors or harmony among coworkers" or to preserve the "kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Pickering*, 391 U.S. at 570, 88 S.Ct. at 1735.

The defendants presented evidence that Voigt's criticism of Judge Savell at staff meetings severely damaged office harmony and undermined Judge Savell's authority. Affidavits from three employees present at Voigt's staff meetings reveal that they felt Voigt's disparaging comments about Judge Savell and his choice for ACA were disruptive and undermining to office harmony. This evidence is undisputed.

The time, place, and manner of the employee's speech is also relevant to the question whether the

employing agency's institutional efficiency was threatened. *Connick*, 461 U.S. at 153, 103 S.Ct. at 1693. In *Connick*, the Court concluded that "[t]he limited First Amendment interest involved [did] not require that [the defendant] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154, 103 S.Ct. at 1694. The Supreme Court explained that the fact that the assistant district attorney exercised her right to speech at the office supported the defendant's fears that the functioning of his office was endangered. *Id.* at 153, 103 S.Ct. at 1693. The assistant district attorney's questionnaire also arose in the context of her employment dispute with the defendant regarding the application of an office policy. *Id.* Her attempts to solicit views regarding that policy from other staff were appropriately viewed by her employer as an attempt to threaten his authority. *Id.*

Voigt also exercised his right to speech at the office.[4] His statements were made in a staff meeting and in conversations with other supervisory level employees. His speech consisted of direct criticism of Judge Savell's

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[4] Voigt leaked to the press a memorandum from Judge Hodges to Judge Savell which was highly critical of Judge Savell's handling of the FJC A hiring. Memoranda between Judge Hodges and Judge Savell indicate that the working relationship between the two judges was undermined because Judge Savell thought Judge Hodges or his staff had leaked the memorandum. While it is undisputed that Voigt's conduct in leaking this document was disruptive, the defendants have not demonstrated that it played a part in the decision to terminate Voigt. Therefore, we will not consider this disclosure or its disruptive effects as part of the *Pickering* analysis.

handling of internal matters in which Voigt was directly involved. Moreover, his speech went beyond criticism of Judge Savell to include attempts to undermine the authority of a newly hired employee who would directly supervise Voigt. The form and context of Voigt's speech supports the defendants' concerns, reflected in Voigt's termination letter, that the functioning of the workplace was endangered.

The defendants have met their burden under *Pickering*. The limited First Amendment interest involved here does not require that the defendants tolerate actions which they reasonably believed caused disruption in the workplace and undermined the authority of Voigt's superiors.

Voigt argues that our recent decision in *Johnson v. Multnomah County, Oregon*, 48 F.3d 420 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2616, 132 L.Ed.2d 858 (1995), compels a reversal of the dismissal of his section 1983 claim. We disagree. *Johnson* is readily distinguishable.

In *Johnson*, a public employee was disturbed by the fact that she did not receive her immediate supervisor's position when the position became vacant. *Id.* at 421. Johnson began making accusations about the new supervisor to coworkers and others which ranged from mismanagement and misuse of public resources, to allegations of criminal behavior. *Id.* at 424-25. We rejected the defendant's argument that because Johnson's statements were false and made with a reckless disregard for the truth, they could not be considered matters of public concern as a matter of law. *Id.* at 423. Instead, we held that "the recklessness of the employee and the falseness

of the statements should be considered in light of the public employer's showing of actual injury to its legitimate interests, as part of the *Pickering* balancing test." *Id.* at 424.

In determining whether Johnson's speech involved a matter of public concern, we distinguished *Connick*, where the employee's speech arose in the context of an employee grievance *and* related to internal administrative procedures. *Id.* at 425. In contrast, Johnson's statements regarding criminal misuse of public funds, wastefulness, and inefficiency in managing and operating government entities were matters of *inherent* public concern. *Id.* at 425. Thus, despite the fact that Johnson "was embittered about not having been promoted," her speech did not constitute an "employee grievance" within the meaning of *Connick*. *Id.*

Finally, after applying the *Pickering* analysis, we held that the employer was not entitled to summary judgment on the ground that its legitimate administrative interests outweighed Johnson's First Amendment interest in free speech. *Id.* at 427. The employer had submitted evidence that Johnson's statements interfered with the close working relationship between Johnson and her supervisor, and undermined her supervisor's relationships with coworkers, subordinates and private vendors. *Id.* We held that the employer had to show more than mere disruption of office relationships. *Id.* We reasoned that the employer had to show actual injury to its *legitimate* interests in order to prevail under the *Pickering* test. *Id.* An employer does not have "a legitimate interest in covering up mismanagement or corruption and cannot justify retaliation against whistleblowers as a legitimate means

of avoiding the disruption that necessarily accompanies such exposure." *Id.*

The instant case presents a significantly different factual scenario than *Johnson*. Johnson's speech included allegations of criminal wrongdoing and abuse of power. Such accusations involve matters of inherent public concern and the burden on the employer in demonstrating that its interests outweigh the First Amendment interest of the employee is correspondingly onerous. *See id.* at 426 (" '[t]he more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made' ") (citation omitted).

In contrast, Voigt's speech did not involve serious allegations of mismanagement or criminal corruption. Rather, Voigt criticized the wisdom and fairness of Judge Savell's decisions regarding internal personnel matters. In doing so, he touched upon matters of limited public concern. The facts in the instant matter parallel the situation described in *Connick*, where although the employee's speech was primarily related to an employee grievance, one aspect of it touched on a matter of public concern. *Connick*, 461 U.S. at 148-49, 103 S.Ct. at 1690-91. The Supreme Court made clear in *Connick* that where speech touches on an issue of public concern only in a limited sense, and arises within the context of an employee grievance, the employer's interest in avoiding disruption of the workplace may outweigh the employee's First Amendment interest. *Id.* at 150-53, 103 S.Ct. at 1691-93.

Assuming arguendo that Voigt can allege facts to support a wrongful discharge claim under state law, his

cause of action cannot be converted into a federal constitutional claim simply because Voigt was a public employee. *See id.* at 154, 103 S.Ct. at 1694 ("it would indeed by a Pyrrhic victory for the great principles of free expression if the [First] Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize [an] employee grievance").

IV

The district court dismissed as abandoned Voigt's claim under 42 U.S.C. § 1983 that the defendants deprived him of his Fourteenth Amendment procedural due process rights. Voigt received a pre-termination hearing, but chose to file an action in federal court rather than to pursue the full array of post-termination administrative remedies provided by state law. Throughout the proceedings before the district court, Voigt maintained that the defendants failed to comply with the state's clearly established substantive and procedural requirements. In his opposition to the defendants' motion for partial summary judgment, however, Voigt stated that he

> abandons his claim that procedural due process was violated by the manner in which the pre-termination hearing was conducted because *Loudermill* left undecided the specific minimal requirements of a pre-termination hearing. Defendants did not provide a full procedural due process hearing, but *Loudermill* and progeny have so far not required that.

Voigt argues that he did not abandon his contention that the defendants failed to follow the procedural requirements clearly established by *state* law, such as the constructive and progressive discipline procedures required by the Alaska Court System's personnel rules. Voigt asserts that an employer's personnel procedures provide the most obvious means for fixing the standards of procedural due process to which an employee is entitled.

Voigt's argument is based on the incorrect assumption that state law informs the second prong of the federal procedural due process analysis. This part of the analysis asks what process is due once it has been determined that the defendant has an interest protected under the Fourteenth Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153, 71 L.Ed.2d 265. What procedures are constitutionally required if the state seeks to deprive the defendant of a protected interest is determined by federal law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492-93, 84 L.Ed.2d 494 (once it is determined that the Due Process Clause applies because state law creates a property right, the remaining question regarding what process is due is *not* to be found in the state statute). Where the plaintiff has been deprived of his property interest in tenured public employment, the minimum procedures required for Fourteenth Amendment purposes are set forth in *Loudermill*. *See Wheaton*, 931 F.2d at 617 (court could not, on the record before it, determine whether the plaintiff had received all of the process he was due, but cited *Loudermill* for the "root requirement"

of the Due Process Clause that the plaintiff receive a pre-termination hearing).

Voigt does not argue that the procedures established by Alaska state law are themselves inadequate to satisfy the federal constitution. *See Vitek v. Jones*, 445 U.S. 480, 491, 100 S.Ct. 1254, 1263, 63 L.Ed.2d 552 (1980) ("minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action"). Rather, he contends that the defendants failed to follow the extensive procedures established by state law, such as constructive and progressive discipline. That claim must be presented to an Alaska court. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 95-96, 104 S.Ct. 900, 905-06, 79 L.Ed.2d 67 (1984) (claim against state officials that the officials failed to follow the requirements of a state statute is a state law claim). By abandoning his argument that the defendants failed to satisfy the pre-termination hearing requirement established in *Loudermill*, Voigt abandoned his federal procedural due process claim.

V

The district court granted summary judgment in favor of the defendants on Voigt's claim under 42 U.S.C. § 1985(3), in part on the ground that Voigt lacks standing to assert this claim. Standing is a purely legal issue which requires our independent or de novo determination, without deference to the district court's conclusion. *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1454 (9th Cir.1995).

Voigt's section 1985(3) claim is based on two distinct theories: (1) the defendants conspired to deprive Voigt of his property interest in violation of his Fourteenth Amendment rights; and (2) the defendants conspired to violate the constitutional rights of non-resident job applicants, adversely affecting their rights to equal protection, privileges and immunities, and travel.

"Plaintiffs have standing under Section 1985 only if they can show they are members of a class that the government has determined 'require[s] and warrant[s] special federal assistance in protecting their civil rights.' " *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir.1994) quoting *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536-37 (9th Cir.1992) (alterations in original). Voigt identifies non-residents of Alaska as a class warranting special federal protection under section 1985. Voigt, however, is a resident of Alaska, and was an Alaska resident at the time he was discharged. Thus, he cannot show that he is a member of the class he has identified. Voigt states no claim under section 1985(3) that the defendants conspired to violate *his* constitutional rights.

With regard to Voigt's claim that the defendants conspired to violate the constitutional rights of non-residents, Voigt argues that he has third-party standing to assert non-residents' rights. "Although a plaintiff generally 'cannot rest his claim to relief on the legal rights or interests of third parties,' the Supreme Court has recognized an exception where the plaintiff meets [each of] the following three criteria: first, the plaintiff must have a concrete interest in the outcome of the dispute; second, the plaintiff must have a close relationship with the party whose rights it is asserting; and third, 'there must exist

some hindrance to the third party's ability to protect his or her own interests[.]' " *Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir.1994) (citations omitted).

The "concrete interest" criterion asks whether the litigant has suffered some injury-in-fact, adequate to satisfy Article III's case-or-controversy requirement. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3, 109 S.Ct. 2646, 2651 n. 3, 105 L.Ed.2d 528 (1989). Voigt contends that he was fired in part because he failed to adhere to the defendants' unspoken policy of discriminating against non-residents. If the constitutional claim Voigt advances on behalf of non-residents is vindicated, he may be entitled to damages associated with his termination or injunctive relief reinstating him to his position. This is sufficient to show that Voigt has a concrete interest in the outcome of the dispute. *See id.* (lawyer's stake in $170,000 of forfeited assets which he would almost certainly receive if the Sixth Amendment claim he advanced were vindicated meets injury-in-fact requirement).

The second criterion for third-party standing requires that Voigt have a close relationship with non-residents of Alaska. Voigt asserts that because he is in a position to hire non-residents as employees of the Alaska Court System, he has a close relationship with non-residents sufficient to satisfy this criterion. We disagree.

There are two underlying rationales for permitting third-party standing where there is a close relationship between the plaintiff and the third party. *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868, 2874, 49 L.Ed.2d 826 (1976). Where the enjoyment of the right the plaintiff

asserts is "inextricably bound up" with the activity the plaintiff wishes to pursue, the court "can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit." *Id.* at 114-15, 96 S.Ct. at 2874. In addition, "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115, 96 S.Ct. at 2874.

Voigt's only connection to non-residents is that he may occasionally be in a position to hire a non-resident for a position within the state court system. Such an intermittent connection does not sufficiently advance the underlying rationales for permitting third-party standing. *See Constr. Ind. Ass'n, Sonoma Co. v. City of Petaluma,* 522 F.2d 897, 904 (9th Cir.1975), *cert. denied,* 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342 (1976) (no standing where there was no special, on-going relationship between plaintiffs and those whose rights allegedly were violated).

A review of caselaw in which a close relationship warranted third-party standing further supports the conclusion that Voigt does not have a relationship sufficient to justify third-party standing. *See e.g., Griswold v. Connecticut,* 381 U.S. 479, 481, 85 S.Ct. 1678, 1680, 14 L.Ed.2d 510 (1965) (physician had standing to raise the constitutional rights of her patients where she was subject to criminal conviction under the challenged statute for serving those patients); *NAACP v. Alabama,* 357 U.S. 449, 458-59, 78 S.Ct. 1163, 1169-70, 2 L.Ed.2d 1488 (1958) (NAACP had standing to assert rights of its members not to reveal their affiliation with the Association because the NAACP and its members are in every practical sense

identical); *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1411 (9th Cir.1993) (plaintiffs had standing to assert their mothers' equal protection rights in challenging the constitutionality of a statute that granted citizenship to foreign-born children of United States citizen fathers but not to those born of United States citizen mothers, because plaintiffs' interests coincided with and were equally as intense as their mothers' interests).

Because we conclude that Voigt lacks third-party standing to assert non-residents' rights, we need not reach the question whether non-residents themselves are members of a class entitled to protection under section 1985(3).

VI

After granting summary judgment in favor of the defendants on all of Voigt's federal claims, the district court dismissed Voigt's state law claims without prejudice to their renewal in state court. Voigt argues that the district court "repeatedly erred in attempting to identify and separate appellant's federal civil rights claims from his state wrongful discharge claims." This argument is without merit. Voigt has misconstrued the district court's legitimate attempts to manage the case in order to avoid deciding issues involving unsettled state law unless federal claims were properly before the court.

Pursuant to 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a claim if the court has dismissed all claims over which it has original jurisdiction. *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir.1992), *cert. denied*, ___ U.S.

___, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993). The district court's dismissal of Voigt's state law claims was clearly within its discretion. *See id.* (" 'if the federal claims are dismissed before trial [ ] the state claims should be dismissed as well' ") (citation omitted).

VII

The district court denied Voigt's motion for reassignment pursuant to 28 U.S.C. § 455(a).[5] Disqualification of a district judge is appropriate under section 455(a) "where 'a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.' " *Yagman v. Republic Ins.*, 987 F.2d 622, 626 (9th Cir.1993) (citations omitted). We review a district court's denial of a motion for disqualification for abuse of discretion. *Id.*

Judge Singleton served for 20 years as an Alaska state court judge. Voigt argues that Judge Singleton's impartiality is reasonably questioned in this case because the defendants include a judge and several administrators of the Alaska Court System. He also points out that two of Judge Singleton's former law clerks are involved in this case. One is named as a defendant in the case and the other is serving as counsel for the defendants.

In denying Voigt's motion, Judge Singleton described his minimal contact with the Fairbanks bench and bar,

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[5] 28 U.S.C. § 455(a) reads:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

including Judge Savell, to whom he was only recently introduced at a State-Federal Committee. Judge Singleton served as a superior court judge for the Third Judicial District during his service as a state judge. His chambers were in Anchorage, a significant distance from Fairbanks. His present federal court chambers are also in Anchorage and he has never lived in another community in Alaska. The judge explained that he has no ongoing personal relationship with any state judge or administrator named in the complaint or likely to be a witness. He further explained that with regard to his former law clerks, he has had no ongoing personal relationship with either of them in over fifteen years.

In rejecting the motion for reassignment, Judge Singleton quoted and applied the proper standard. A reasonable person informed of the foregoing facts would not conclude that Judge Singleton's impartiality might reasonably be questioned. The district court did not abuse its discretion in denying Voigt's motion seeking reassignment of the case to a different judge.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. Burk Voigt,)
Plaintiff,)
vs.)
Richard D. Savell, et al.)
Defendants.)

Case No. F92-012 Civil

FINAL DECISION REGARDING FEDERAL CLAIMS

(Filed May 9, 1994)

J. Burk Voigt ("Voigt") sues Richard D. Savell and others for an alleged violation of his federal constitutional rights. He relies upon 42 U.S.C. §§ 1983 and 1985. This Court has jurisdiction. 28 U.S.C. § 1343. Pending before this Court is a motion for summary judgment by the Defendants on the basis of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court issued a tentative decision on January 31, 1994, which was filed on February 2, 1994. *See* Docket No. 114. Oral argument was held on Monday, March 28, 1994. The Court issued an oral decision at that time, which is set out in this decision.

Voigt was an administrative officer of the state judiciary in the Fourth Judicial District of the State of Alaska. His firing prompted this lawsuit. Voight argues that his federal constitutional rights were violated. In addition, he

argues that his state statutory and constitutional rights were violated and that this Court should exercise supplemental jurisdiction over the state claims. *See* 28 U.S.C. § 1367.

I have concluded that Defendants are entitled to summary judgment on the federal claims on the basis of qualified immunity. My intention would be to dismiss the state claims without prejudice to their renewal in state court. The parties should address this question in a written response to be filed no later than Tuesday, May 31, 1994 at 12:00 p.m.

Before addressing Voigt's federal claims and the doctrine of qualified immunity, it is necessary to first address 42 U.S.C. §§ 1983 & 1985 because an understanding of the operation of those statutes in the context of federalism and comity is necessary to explain my reluctance to try the non-federal claims in this case.

The civil rights statues were enacted by Congress after the Civil War to address significant problems with the administration of justice. The recently-freed slaves had been granted citizenship along with a number of protections in the Civil War amendments to the United States Constitution, Amendments XIII-XV. Nevertheless, the climate of opinion in the former slave states, fueled by all of the emotions generated by the war, was definitely hostile to the exercise of those newly-given rights.

Congress responded by adopting laws which would provide a federal forum for the redress of grievances which, while theoretically redressable under state law, in practice were not addressable in a state forum. *See, e.g., Monroe v. Pape*, 365 U.S. 167 (1961). It is clear from *Monroe*

and its progeny that the Supreme Court never viewed § 1983 as a general grant of jurisdiction to federal courts to provide a remedy every time a person could plausibly argue that she was the victim of a breach of contract or a tort by a state agent acting within the agent's scope of authority.

In the area of public employee discipline and discharge, it is particularly necessary to differentiate between legitimate claims of tort or breach of contract properly pursued in state court and legitimate claims of constitutional violation, which may be pursued in federal court. This is so for two reasons. First, a public employee complaining about her discipline or discharge need not exhaust her state remedies before suing in federal court, *see Patsy v. Board of Regents*, 457 U.S. 496 (1982); consequently, such an employee will virtually always have state remedies available which can be presented within the supplemental jurisdiction of the federal court. Second, there are district court decisions that seem to blur the distinction between state and federal remedies and treat §§ 1983 & 1985 as establishing the federal courts as a super personnel board for the resolution of public employee grievances. In some cases, sensitivity to context suggests that the district judge engaging in such extensions of §§ 1983 & 1985 may have believed that the situation was akin to that in *Monroe v. Pape*, where state remedies were arguably available but were not available in practice. Such an inference is particularly supportable where the employee seeking a federal forum is a member of a group disfavored by the community in which the

case arises. In such a community, there may be justification in broadly reading § 1983 to swallow up the state laws governing employers and employees.

There is no such justification in Alaska because the courts of Alaska have always prided themselves on occupying the "cutting edge" in the expansion of the civil rights laws. *See, e.g., Ravin v. State,* 537 P.2d 494 (Alaska 1975) (recognizing state constitutional right to possess up to 4 ounces of marijuana in the home); *Breese v. State,* 501 P.2d 159 (Alaska 1972) (recognizing a schoolboy's constitutional right to wear his hair any length he chooses). I have addressed the readiness with which Alaska affords public employees substantial rights in discipline cases in *Witte v. Matanuska-Susitna Borough,* 787 F.Supp. 907, 909-11 (D. Alaska 1992). *See also Odum v. University of Alaska,* 845 P.2d 432 (Alaska 1993). In summary, the courts of Alaska are ready, willing and able to protect the civil rights of local litigants. Consequently, there is no need for a federal court sitting in Alaska to protect litigants' rights under state law; the state courts will do that. The federal courts may properly limit themselves to protecting litigants' federal constitutional rights.

Voigt complains that this Court required the parties to brief the issue of qualified immunity before they were ready to do so, thus inhibiting their rights in an adversary system. I do this in all public employee discipline cases because both parties, for different reasons, generally prefer a federal forum to a state forum for the resolution of state issues. *Witte,* 787 F. Supp. at 911-12 n.5. Plaintiffs assume that they will have to pursue the same discovery and marshal the same facts to prevail and the

litigation of all issues together may enhance the settlement value of the case while at the same time limiting the cost.

Public employers also gain a number of advantages. First, they litigate in Anchorage or Fairbanks rather than in more rural areas. *See, e.g., Wilson v. City of Kotzebue*, 627 P.2d 623, 633-36 (Alaska 1981) (holding that trial court improperly changed venue to Anchorage in action to recover damages for injuries to intoxicated prisoner; City persuaded trial court that it could not get a fair trial in its own community). Second, the federal courts are much more willing to grant summary judgment than are Alaska state courts. *Cf. Erickson v. Pierce County*, 960 F.2d 801, 805 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992) (summary judgment for county was appropriate because public employee failed to present facts sufficient to raise reasonable inference that her constitutionally-protected activities were a motivating factor behind employer's decision to terminate her), and *Sever v. Alaska Pulp Co.*, 978 F.2d 1529 (9th Cir. 1992) (affirming summary judgment for defendant on §§ 1983 1985(3) claims and dismissal without prejudice of state law claims), *with Cameron v. Beard*, 864 P.2d 538 (*Alaska* 1993) (affirming superior court's denial of state's motions for summary judgment seeking official immunity from public employee's claims of constructive discharge and intentional infliction of emotional distress).

In summary, most public employers would prefer to delay litigating federal rights until the whole record was developed so that the court would be required to consider both state and federal issues together. In my view, such a procedure infringes upon comity and federalism.

Where a litigant has substantial federal claims, she should be able to litigate her state and federal claims together in federal court to save time and cost. Where federal claims are insubstantial, however, comity suggests that the federal claims be resolved before the parties thoroughly develop the record on the state claims so that the state claims can be resolved in state court. *Cf. Hunter v. Bryant*, 112 S. Ct. 534, 537 (1991) (immunity ordinarily should be decided by the court long before trial), *with United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial . . . the state claims should be dismissed as well.").

Voigt makes two related but distinct arguments. First, he contends that all of the Defendants were parties to a conspiracy to discriminate between residents and non-residents in hiring to fill vacancies in the state judicial system support staff. He contends that he opposed this practice, and his opposition led in part to his firing. Voigt asserts standing in a representative capacity to assert the rights of non-resident prospective employees of the state judiciary under the privileges and Immunities Clause and Equal protection Clause of the Fourteenth Amendment to the United States Constitution. Voigt relies upon one Defendant's assertion that he thought such a policy would have been illegal to show that the law was clearly established at that time that discriminating against non-residents in hiring for state employment violated the United States Constitution.

The illegality of such discrimination is the linchpin of this aspect of Voigt's argument. I have determined that a state may allow its bona fide residents a preference in competing for state employment with non-residents; and

that, therefore, the policy, if it existed, did not violate the United States Constitution. Consequently, the law is not clearly established that such a policy violates anyone's constitutional rights, and the Defendants are entitled to qualified immunity on that claim.[1]

In addressing this issue, it is important to focus on Voigt's claim. He does not contends that any personal rule or state statute established a hiring preference for residents. He contends that Administrative Director Arthur Snowden and his aides established an informal policy of favoring residents over non-residents for some positions. Voigt cannot contend that this was a blanket policy since he was a non-resident living outside Alaska at the time he was hired. The same is true of the two contenders for the position of Area Court Administrator in Fairbanks, whose selection led to Voigt's second area of concern. On the other hand, there is evidence, albeit disputed, that Snowden and others preferred to fill vacancies with Alaskans rather than to hire applicants from out of state. Such a policy does not violate federal law unless it involves application of a durational residency requirement. Both the federal and state courts have

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[1] Voigt objects that the qualified immunity defense should not be available to conspiring public officials under § 1985(3), citing *Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785, 794 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993). I do not find the reasoning of the Eleventh Circuit to be persuasive in this case. Moreover, the issue is essentially mooted by the fact that any "conspiracy" to favor Alaskans over out-of-state applicants for public employment positions would not violate the Constitution and would not be the type of "invidious discrimination" that § 1985(3) was designed to prevent.

found durational residency requirements for state employment to be in violation of the respective constitutions. *See, e.g., Attorney General of New York v. Soto Lopez,* 476 U.S. 898 (1986); *State v. Wylie,* 516 P.2d 142 (*Alaska* 1973).

On the federal side, the United States Supreme Court has distinguished between a bona fide residency requirement, which requires a person to establish residency before becoming eligible for state employment, and a durational residency requirement, which requires a period of state residency before becoming eligible for such employment. *Soto Lopez,* 476 U.S. at 903 n. 3; *Wylie,* 516 P.2d at 150. No federal case disapproves the former requirement for state employment, although a number of Supreme Court opinions refuse to allow such a preferential policy in related areas, such as the practice of law, *see, e.g., Supreme Court of new Hampshire v. Piper,* 470 U.S. 274 (1985), or to work on publicly-funded projects, *United Bldg. and Constr. Trades Council v. Mayor of the City of Camden,* 465 U.S. 208 (1984). Nevertheless, there is no constitutional impediment to a residency preference for public employment so long as it does not become a durational residency requirement. In fact, such a residency requirement does not impede interstate travel but instead requires it, since in order to be eligible for state employment, a person must travel here and establish residence.[2]

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[2] If we look only at the precise incident that Voigt contends evidences discrimination against non-residents, it appears that the discrimination was between a current employee seeking a transfer and a former employee, now residing out of state, seeking a position. There is nothing in the federal constitution that prevents the state from favoring its current employees in

In any event, Voigt does not have standing to assert the rights of non-residents seeking state employment. *See, e.g., Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992). Case law makes it clear that non-residents have no trouble asserting their "right to travel" in litigation to establish their right to compete with residents for public benefits, and Voigt does not have any special relationship with non-residents that would make him an appropriate spokesman.

The second incident about which Voigt complains concerns Judge Savell's hiring of an Area Court Administrator. Two non-residents were contending for the position: Judith Cramer, a court administrator from Ohio, and Donald Mills, an administrator from Oregon. The judges apparently preferred Cramer and offered her the job. When she declined, the job was offered to Mills, who accepted it. Thereafter, Cramer changed her mind and Judge Savell attempted to rescind his offer to Mills so he could hire Cramer. Judge Hodges and Voigt took exception to this transaction, and Voigt publicly criticized Savell at a staff meeting and leaked a critical memorandum from Hodges to the press.

I have carefully examined this incident under the standards articulated in *Erickson*, 960 F.2d at 804. Assuming that Voigt's actions regarding the Cramer/Mills controversy contributed to his firing and that he would not

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competition with non-employees or former employees. Of course, state personnel rules may require open competition for jobs; but if Voigt believes that the court administration improperly applied state law, his remedy would appear to be in state court.

have been fired anyway, I am not prepared to find that Voigt's actions are entitled to constitutional protection. Voigt, as a supervisory employee, exacerbated an unpleasant situation by showing his disloyalty, bringing the controversy to the public's attention. While the controversy did not reflect well on the Fairbanks judges and may have been a matter of public amusement, it was hardly a matter of public concern. *See, e.g., Connick v. Myers,* 461 U.S. 138, 148 n.7 (1983).[3]

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[3] There is nothing in the record to suggest that Voigt was fired for advocating a position on a public issue. Voigt complains that he was fired in part for publicly disclosing the specifics of Cramer's employment to his subordinate staff members and to the press. As the Supreme Court in *Connick* explained, the Constitution does not permit state employees to publicly criticize their supervisors and their supervisors' policies with impunity on trivial grounds for the purpose of public amusement. The Constitution does protect "whistleblowers," men and women who bring matters of "public concern" to public attention. Both matters of public amusement and matters of public concern are "newsworthy" and are likely to attract media attention. In fact, the merely amusing is as likely to be printed or broadcasted as the truly significant. The distinction therefore does not turn on whether the media is interested, but whether the issue is one about which an informed public should be concerned in order to perform a citizen's functions. *See, e.g., Koch v. City of Hutchinson,* 887 F.2d 1436, 1448 (10th Cir.), *cert. denied,* 488 U.S. 909 (1988); *Jurgensen v. Fairfax County, VA,* 745 F.2d 868, 888 (4th Cir. 1984). Thus, if there were pervasive practices or consistent policies within the court system inimicable to the public welfare, Voigt and other state employees must be free to bring these policies and practices to public attention without fear of retaliation. The Cramer/Mills incident did not involve any pervasive practice or consistent policy, it was a single isolated incident. There is nothing in the record to connect Judge Savell's handling of the

In any event, I am not prepared to find that the law was so clearly established that Voigt's comments and actions in the context in which they occurred were entitled to constitutional protection to the extent that Savell and the others lost qualified immunity by relying in part on those actions in deciding to terminate Voigt. *See, e.g., Camarillo v. McCarthy,* 998 F.2d 638, 640 (9th Cir. 1993).[4]

IT IS THEREFORE ORDERED:

The Defendants' motion for partial summary judgment on the issue of qualified immunity at Docket No. 87 is GRANTED. The Court has tentatively decided to dismiss the state law claims without prejudice to their renewal in state court, unless "economy, convenience,

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Cramer selection to the other disputes within the Fairbanks courthouse, which apparently led to the critical review of that court's operation by an outside consultant.

No one contends that Voigt was solely responsible for the morale problems that apparently plagued the Fairbanks superior court. These problems were traceable in part to events that preceded Voigt's employment and in some respects were totally beyond his control. Nevertheless, by leaking Judge Hodges' memorandum to the press and publicly criticizing Judge Savell at staff meetings, Voigt made a bad situation worse *with no foreseeable public benefit in view.* His actions do not warrant constitutional protection.

[4] Voigt relies upon the affidavit of Dr. John Taylor to show a "conspiracy." Construing Dr. Taylor's affidavits in the most favorable way for Voigt, it may be there was a violation of the personnel rules. If so, Voigt's remedy is under state law, not federal law. Expert opinion is not relevant to a determination regarding the state of law. *Meyer v. Fidelity Sav.*, 944 F.2d 562, 577 (9th Cir. 1991), *rev'd on other grounds,* 114 S. Ct. 996 (1994).

fairness and comity" makes this Court a better forum for the resolution of the state claims. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *Rosado v. Wyman*, 397 U.S. 397, 403-405 (1970); *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1309 (9th Cir.), *cert. denied*, 113 S. Ct. 1644 (1992). Any party objecting to dismissal of the state claims without prejudice should file those objections on or before Tuesday, May 31, 1994 at 12:00 p.m.[5]

DATED at Anchorage, Alaska this 5 day of May, 1994.

/s/ James K. Singleton, Jr.
HONORABLE
JAMES K. SINGLETON, JR.
United States
District Court Judge

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[5] In my tentative decision at Docket No. 114, I discussed the facts and the law generally, intruding into some areas that were not directly germane to the issue of qualified immunity. It was not my intention to pre-try the state law claims or establish the law of the case to bind a later judge faced with Voigt's claims that his termination did not conform to state law. To the extent that any of my remarks could be so interpreted, they are disaffirmed. The only issues decided at this time are qualified immunity and Voigt's standing to assert a § 1985 claim.

APPENDIX C

THE UNITED STATES CONSTITUTION

Article III, § 2, Clause 1 provides:

Jurisdiction. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; – to all cases affecting ambassadors, other public ministers and consuls; – to all cases of admiralty and maritime jurisdiction; – to controversies to which the United States shall be a party; – to controversies between two or more states; – between a state and citizens of another state; – between citizens of different states; – between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

THE UNITED STATES CONSTITUTION

Article IV, § 2, Claus 1 provides:

Privileges and immunities; fugitives. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

THE UNITED STATES CONSTITUTION

Amendment I provides:

Freedom of religion, of speech, and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

right of the people peaceably to assemble, and to petition the government for a redress of grievances.

THE UNITED STATES CONSTITUTION

Amendment XIV, § 1 provides:

Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 United States Code § 1985(3) provides:

Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Federal Rule of Civil Procedure 56 provides:

Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the

whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may made such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX D

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT,
Plaintiff,
v.
RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA,
Defendants.

Case No. F92-12 Civil

AFFIDAVIT OF JOHN N. TAYLOR, Ph.D.

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

John N. Taylor, being first sworn, states:

1. I am an Associate Professor of Management at the University of Alaska, Fairbanks campus. My field of specialty is personnel management.

2. I do not know any of the parties in this lawsuit personally, although I have seen Judge Savell in court when I was a prospective juror and I have spoken to Area

Court Administrator, Ronald Woods once, shortly after his arrival in Fairbanks.

3. I have reviewed what I have been told by attorney Thomas Wickwire to be J. Burk Voigt's entire personnel file with the Alaska Court System, copy attached. I have also been told to assume as fact that Ronald D. Woods replaced Richard Savell as Mr. Voigt's immediate supervisor for the last five months of his employment.

4. I have reviewed the *Alaska Court System Personnel Rules*. This is a comprehensive set of personnel rules, typical of those found in any large private or government employer organizations. Such rules when followed should, in nearly all cases, meet the employer's duty of good faith and fair dealing with its employees. These rules also set up a system of progressive discipline.

5. Progressive discipline is the process of monitoring an employee's job performance in a fair and constructive manner by giving the employee notice of his deficiencies and communicating to him in order to improve them, providing instruction and training opportunities, then following that with feedback on the success of the employee's efforts to bring his performance back to acceptable levels. It is often called "progressive and constructive" discipline to emphasize the training on the identified deficiencies and the feedback elements of it because these are the elements designed to solve the problem; without them, the system degenerates to one of simply watching the weak areas of performance get worse until the problem grows to one needing a drastic solution, such as termination.

6. Progressive discipline steps, which should precede a termination for a performance deficiency, are typically verbal reprimand, written reprimand, short suspension, longer suspension, termination. These steps vary in their specifies with the organization. Sometimes three steps are sufficient and the specific method may also vary, but the process is the same. The important elements of each step are: (1) having a clear standard of performance, (2) notification of the areas that the performance is inadequate, (3) clearly informing the employee of what is expected to improve, (4) provide him the means and opportunity to improve, and (5) warning him that if he does not improve, harsher steps will follow.

7. In my opinion, the progressive and constructive discipline procedures required by court personnel rules 8.01.01 through 8.06 were not followed in Mr. Voigt's case prior to the March 24, 1992 decision to terminate him. The steps in progressive discipline, which should precede a decision to terminate, are not in Mr. Voigt's file. At worst, there were critical comments on Mr. Voigt's interpersonal skills in two prior evaluations but overall, rated him above satisfactory and recommended a merit pay increase. None of these criticisms were disciplinary and these evaluations were not followed by any follow up steps prior to the March 24, 1992, letter of notification of intent to dismiss. There is only one documented training session.

8. The only discipline step Mr. Voigt received was a Written Reprimand on May 15, 1991, from Judge Richard Savell, his immediate supervisor. I have been informed, and assume to be true, that Mr. Voigt's supervisor changed from Judge Richard Savell in early November

1991 to Ronald Woods. In Mr. Voigt's personnel file, there is no record of any further disciplinary action taken by Judge Savell or of any by Mr. Woods from the reprimand to the termination in late March 1992.

9. The "intention to dismiss: letter of March 24, 1992, restates some of the same incidents (as distinguished from new incidents of the same trait) that were in the May 15, 1991, Reprimand. It is widely considered by personnel professionals to be inappropriate to discipline someone for the same act which has been the subject of prior discipline. An example of this is in the March 24, 1992, intent to terminate letter, citing Voigt's criticism of Savell's decision to hire a certain person as Area Court Administrator then after using this same conduct as grounds for the earlier reprimand. This is unfair as a form of double punishment and procedurally, because repeated punishment for the same act denies the employee the chance to correct it.

10. The March 24, 1992 letter stating the reasons for the decision to terminate Mr. Voigt show, on their face, a series of supervision type errors. Assuming these acts are true, there should have been evidence of training in supervision since Mr. Voigt's hiring, but there is none. There is only one documented training session in his file and it is not on this topic. Whatever training an employee has had should be recorded in his personnel file to both give him credit for it and hold him responsible for using it.

11. In order for management to be acting in good faith in this process, the employer must provide current and valid job descriptions which clearly outline specific

duties and responsibilities and set the performance standards expected; performance evaluations then must focus upon the standards of those duties and responsibilities and be communicated to the employee; this should include a face to face conference with the employee; there should be a good faith effort on management's part to provide training, job coaching, counselling or some proactive or forward looking opportunity for the employee to make the needed corrections, e.g., learn new skills, assume new responsibilities or, use a different approach to the problem.

12. Mr. Voigt's performance evaluations should be based on and address his performance in those areas covered by his job description, but the job description is not in his personnel file, nor do the evaluations refer back to those as setting the standard. One example of this causing a problem, where it could have avoided one, is the criticism of Voigt, twice, for "playing games" with Judge Savell by not performing the duties of "Assistant Area Court Administrator" after Savell relieved him of the duties of "Acting Area Court Administrator." Since Voigt was instructed to do one but not the other, there should have been a clear line between the duties of these two positions, but such a line is not discernible to me from anything in Voigt's personnel file. There is neither a job description, nor any reference back to Voigt's job description that pointed him to where he should have known the difference between the duties of these two positions. There is nothing in Voigt's personnel file from which I can discern that difference or that indicates that Mr. Voigt should have known where that line was.

13. It is preferable for an employer to have all termination decisions independently reviewed prior to termination because experience has shown that the clash between the two principal personalities often causes reason and fairness to take second place to the desire of the supervisor to remove the problem by placing all responsibility for it on the subordinate.

14. Mr. Voigt's personnel file shows no independent review of Savell's and Woods' March 24, 1992 decision to terminate Mr. Voigt. By "independent review", I mean a review of the decision before the supervisor becomes committed to it, meaning before it is announced, and by someone with greater authority in the organization in personnel matters. The review decision by Judge Steinkruger of March 27, 1992 is not the kind of review process that should have been done because it was done after Savell's and Woods' decision of March 24, 1992 and because Judge Savell, as Presiding Superior Court Judge had greater authority in personnel matters than did Judge Steinkruger.

15. I have reviewed, either as a manager or consultant, at least 15 personnel decisions to terminate an employee. The March 24, 1992, intent to terminate letter is suspect in its collection of a variety of complaints all on March 23, 1992, without any indication of performance problems of that type in the six months or so prior to that where the progressive discipline record should have appeared.

16. The manner in which the complaints listed in the March 24, 1992, letter were collected indicates to me

that there was probably some other reason for the supervisors' decision to do this, i.e., it has the indications of a "witch hunt". I do not, however, have enough information on which to base an opinion on what may have preceded the decision to conduct the witch hunt; only that it is apparent to me that there probably was some other reason for the decision than what is stated in the March 24, 1992 letter.

/s/ John N. Taylor
John N. Taylor

SUBSCRIBED AND SWORN to before me this 14th day of May, 1992.

/s/ Brian D. Fisher
NOTARY PUBLIC IN
AND FOR ALASKA
My commission expires: 11/7/94

APPENDIX E

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT,	)
Plaintiff,	)
v.	)
RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA,	)
Defendants.	)
Case No. F92-12 Civil	)

AFFIDAVIT OF JAY HODGES

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

Jay Hodges, being first sworn, states:

1. I have been a Superior Court Judge in Fairbanks since December 1976. For approximately 5 years I was either the Presiding Judge or Acting Presiding Judge. Even when I was not the presiding or acting presiding judge I was involved administratively with the calendar and also interested in the overall work and efficiency of the Clerk's Office. I spend more time in the clerk's office

than any other Superior Court Judge and probably more than the District Court Judges.

2. During more than 15 years as a Superior Court Judge in Fairbanks there have been four Clerks of Court. Of these, Burk Voigt was head and shoulders above the other three in his professionalism as an administrator and in seeing that the Clerk's Office ran smoothly and efficiently. The Clerk's Office ran more efficiently than at any other time since I have been on the bench. Burk's management style is to make sure each person is responsible for his/her job and mistakes. This improved the efficiency since each person was responsible for his/her job.

3. One of his primary goals was serving the public in a professional, efficient and pleasant manner. During his tenure as the Clerk of Court, through his administrative abilities and hard work, the Clerk's Office achieved that goal. The morale and friendliness in the clerk's office was at an all time high when Burk was the clerk of court. It has deteriorated since he was fired.

4. Not everyone was happy with these changes and it is my perception that a few people did not welcome them and would have preferred the old ways. They did not like being accountable for their own actions.

5. Apparently, from the flowers and thank you card sent Judge Savell after Burk was fired some of the Clerk's office staff are happier, but the overall morale in the Clerk's Office has deteriorated.

6. From the time Ronald Woods came on the job as Area Court Administrator – November 1991 – to the

firing of Voigt in March 1992, I had numerous conversations with him about various administrative problem areas. One topic that was discussed frequently was the need for automation, and what had already been done on a local basis. On several occasions we discussed Burk Voigt's involvement with automation as well as other local projects. At no time did Ron Woods ever suggest there was any problem with Burk or that he was dissatisfied with his performance. In fact shortly after the initial investigation into the hiring of Megan Crawford, Ron Woods stated to me that Burk, he and I had to stick together. This statement came as a result of Judge Savell's overturning his (Ron Woods') determination that there had been no discrimination regarding Roberta Demoski. I had gone to Ron's office on a matter totally unrelated to this. Ron Woods volunteered that he was very upset at Judge Savell's determination that Roberta Demoski had been discriminated against. He knew that Judge Savell made the decision, not on objective facts, but based on a subject reaction to the Administration being upset that there was an allegation of discrimination involving an Alaska Native. Ron was adamant that there had been no discrimination in hiring Megan rather that Demoski. In fact, there were two other applicants who were rated higher than Demoski and thus she was not in contention for the vacancy. He also told me that Art Snowden had discussed the situation with him, implying that he should have understood local people should be hired rather that [sic] someone from "out of state". Ron told Art he did not understand this from his conversation with Stephanie Cole, but that if Art would put that policy in writing he would comply. Art said it was against the law to put the

policy in writing, but the message was clear. Even after Burk was fired, Mr. Woods told me – that he never had any problem with Voigt's work performance. This was surprising since he had signed Burk's termination letter. During this same conversation, Woods never could give me a clear statement as to what Ron thought Burk did wrong.

7. Neither Ron Woods nor Burk ever mentioned any verbal reprimand from Woods to Voigt. If there had been one, I would have known about it because of my close working relationship with Woods and/or Voigt before Voigt was fired. Woods never made a single negative comment about Voigt until Voigt was fired, and even then it was not clear to me what he meant regarding any problem areas with Burk. It is my belief that Judge Savell and/or the Administration put pressure on Ron Woods to make him change 180 degrees in his attitude toward Burk.

8. If Mr. Voigt were reinstated during the pendency of this case, I would gladly supervise Burk and the clerk's office, either with Woods or independent of Woods. I understand there may be friction between Voigt and Woods if they had to work together while this case was pending but, from my perspective only, I would have no problem working with Mr. Woods and Voigt and that it would be to the court system's advantage to have Mr. Voigt back, in that he is an outstanding administrator and would continue the efficient operation of the Clerk's Office. Attached is a letter I wrote regarding Burk's performance long before any of this came up. It should be in his personnel file. This reflects the outstanding work

Burk has done as the Clerk of Court. I have no reason to believe it would not continue.

9. Neither Frank Koziol, who I understand to be Defendants' counsel, nor anyone from the Administrative section of the court system's Anchorage office has asked for my views or knowledge of the dispute involved in this case. It is puzzling to me that they did not, particularly during the initial Demoski/Crawford investigation, since Megan Crawford initially contacted me regarding a Law Clerk job. This is the first contact she had with the Fairbanks Court System regarding a job since she left her position as a Law Clerk. I already had made arrangements for a Law Clerk, but because of her outstanding performance as a Law Clerk for Judge Savell and myself, and knowing she was moving back to Alaska I told her of a potential opening in the clerk's office, and told her if she was interested in that type of work to contact Burk. It is my understanding that she did in fact contact Burk.

/s/ Jay Hodges
Jay Hodges

SUBSCRIBED AND SWORN to before me this 14th day of June, 1992.

/s/ Brian D. Fisher
NOTARY PUBLIC IN
AND FOR ALASKA
My commission expires: 11/7/94

APPENDIX F

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT,
Plaintiff,
v.
RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA,
Defendants.

Case No. F92-12 Civil

SECOND AFFIDAVIT OF JOHN N. TAYLOR, Ph.D.

STATE OF ALASKA)
FOURTH JUDICIAL DISTRICT) ss.

John N. Taylor, being first sworn, states:

1. I am an Associate Professor of Management at the University of Alaska, Fairbanks campus. My experience and qualifications are set out in detail in my first affidavit in this case of 14 May 1992.

2. In a personnel system with procedures for progressive discipline, such as that of the Alaska Court System, any criticism of an employee to be used as the basis for any discipline is required to be given to the employee in a contemporaneous manner, so the employee may know what is expected of him, have an opportunity to improve, state his rebuttal to it or grieve it, if he so elects.

3. The Alaska Court System Personnel Rules make it quite clear in Appendix B, that discipline and feedback to the employee is a daily responsibility of supervisors. The Court System takes a very modern and progressive position that supervisors have the clear responsibility to take positive action to prevent and progressively correct inadequate employee work performance. The *ex post facto* building of a file of work performance complaints clearly violates the rules, policies and procedures outlined in the Court's Rules and unjustifiably interferes with Mr. Voigt's right to fair dealing in the progressive disciplinary process and raises serious questions about the good faith of the defendants' actions because of this flawed process. The fact pattern of a long term employee, with a sequence of good performance evaluations, pay raises and no major just cause incident, with strong support from some segments of management (re: Judge Hodges' affidavit of June 14, 1992, which I have read) and the major efforts made by one segment of management *ex post facto* to find cause for dismissal, all closely resemble a typical pattern of a management/subordinate relationship suddenly gone sour over some unmentioned issue and management using its superior position to unfairly and unjustifiably terminate an employee for another less embarrassing reason.

4. Tenured public employees in permanent job positions in Alaska are entitled to greater procedural protection than private citizens. The Court System Personnel Rules were written with this intent in mind. Management's failure to comply with established procedures in their handbook violates the employee's right to good faith and fair dealing from the employer. For these reasons, any criticisms not in the personnel file have no bearing on whether the discipline was justified or appropriate and should be disregarded in evaluating whether the discipline was called for. Further, all performance incidents developed and gathered after the termination should be excluded from the employee's personnel file and also not be considered in this case in order to assure the fairness and integrity of the process.

/s/ John N. Taylor
John N. Taylor

SUBSCRIBED AND SWORN to before me this 17th day of June, 1992.

/s/ Brian D Fisher
NOTARY PUBLIC
IN AND FOR ALASKA
My commission expires: 11/7/94

APPENDIX G

THOMAS R. WICKWIRE
3730 University Avenue South
Fairbanks, Alaska 99709
(907) 474-0068

Attorney for J. Burk Voigt

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT, Plaintiff, v. RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON and STATE OF ALASKA, Defendants.	)
Case No. F92-12 Civil	

THIRD AFFIDAVIT OF JOHN N. TAYLOR, Ph.D.

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

John N. Taylor, being first sworn, states:

1. I am an Associate Professor of Management, with a speciality in personnel/Human Resource Management. I have been teaching, researching and consulting in this area of management for seventeen years, the last twelve years in Alaska at the University of Alaska Fairbanks. I

have taught courses in Personnel Management, Employment Law, Compensation Management, Leadership, Training and Development, Organization Design, Human and Organizational Behavior and Human Motivation. My government consulting clients include three agencies of the U.S. Government, state and city government departments, while my for-profit clients include small and medium services businesses. My consulting work includes management, supervisor training in personnel management topics such as proper hiring, interviewing, employment termination procedures, handling of grievances, and alcohol/drug/sexual harassment policies.

2. In my last affidavit, I identified a pattern of ex post facto case building to fire Mr. Voigt for some hidden reason other than the surface reasons given. The defense criticized my analysis by saying that I did not yet have access to all the information. Since my last affidavit, I have reviewed a substantial volume of new materials furnished to me by attorney Thomas R. Wickwire, as more specifically identified in paragraph 4. Now that I have been given access to the details of what took place, not just the outline of what took place and the defense's conclusions, I indeed have a much clearer insight into what happened, how and why.

3. As early as 1990, in the Fairbanks Judgeship Needs Report (see Fairbanks Judgeship Needs Study, December 1990, pp. 3, 17-22), serious problems were identified with the administration of the Fairbanks Court System. Some of the problems identified were absence of camaraderie among the judges, difficult work environment, biting, nasty communications and a serious lack of job descriptions. Further, no well-defined nor respected

chain of command existed and this had seriously damaged the court's morale as well as productivity. There were suggestions made that judges would ignore or thwart the Area Court Administrator (ACA) if he made decisions or policies that they did not personally like. It was also noted that "cliques" of power alliances had already developed in order to achieve personal goals. The power politics were having a bad impact on the court. One employee was quoted in the report as saying, "It is not safe to talk to anyone in this building." The report clearly held the judges, as the senior managers, accountable for fixing these problems and provided examples of how the judges themselves were the cause of some of the problems. The report concluded that these conditions made it impossible for the ACA to be an effective supervisor of the court staff. This conclusion would necessarily also apply to the Chief Clerk's ability to perform his job and supervise his employees effectively in such an unhealthy organizational environment. Within weeks of the report, the ACA was fired. The Chief Clerk, Burk Voigt, was then left to fill the vacuum in a hostile environment of role ambiguity, uncertainty of job duties as acting ACA and an unclear and often violated chain of command. Concurrently during this period, the new Presiding Judge, Judge Richard Savell, badly mismanaged the hiring of a new ACA. This incident was publicly reported in the newspapers and was a major embarrassment. These conditions necessarily increased the stress in working relationships between the presiding judge and the Acting ACA/Chief Clerk and exacerbated many of

the symptoms of an unhealthy working environment displayed by court employees, such as communication difficulties in understanding the intent of simple day-to-day messages, increased job stress, anger, hostility, fear and general emotional distress. Further, it becomes clear, as one studies the interviews between Karrold Jackson and others, particularly with Ronald Woods, that the Alaska State Court System has an overly centralized personnel management system, which leads to increased political behavior as every personnel action is subject to second guessing and managers at all levels feel their authority is undermined.

4. Given this atmosphere, and having read all of the interviews conducted by Karrold Jackson, Stephanie Cole, Ron Woods and Richard Savell prior to Voigt's firing, the investigation by Christine Johnson, in-house attorney for the Court System, all documents identified on the attached list, including, particularly, the statements of Judge Jay Hodges (see Affidavit of Jay Hodges, dtd. June 14, 1992), the judge with the most administrative experience and tenure in the Fairbanks Court System, it is my professional opinion:

a. that deflecting the blame for the morale problems at the court house to Burk Voigt was not justified, given the past history of morale problems, the violations of the chain of command within the court house and the overly centralized personnel system. Mr. Voigt was just another player in a sick system, in which any single supervisor/manager's behavior by itself might seem unusual when artificially put into the context of an ideal, healthy court system.

b. that on March 4, 1992 and again on March 5, 1992, the hidden intent of Cole, Savell and Jackson was revealed not only during employee interviews, but also during the interviews between Jackson and Woods that turned from a discussion to a discipline session where Jackson held Woods personally responsible for solving the Voigt problem (see Interview of Ronald Woods by Karrold Jackson of March 4, 1992, pp. 41-53). The interviews conducted by Judge Savell and Ms. Jackson were conducted in an atmosphere and manner which would reasonably be expected to undermine the authority of Burk Voigt and the morale of the majority of the employees who were not involved in the process. The clear focus of these interviews was to find anyone who had a complaint about the Clerk of Court, not in a balanced, fact-finding, problem solving approach. People who were positive about what was happening were not actively sought. The entire employee interview process of the 4th and 5th has the strong appearance of a pretext. Then when Ms. Jackson interviewed Ronald Woods, she made it very clear to him that he had not been listening carefully enough to the signals that were being sent to him not to hire from outside the state because of the pressure on senior court administrators that this practice brought from the legislature. In fact, she quoted directly from notes made by Sunny Ziots of Stephanie Cole's instructions to Ronald Woods, to wit: that Cole is adamant about not selecting from outside Alaska because this caused Legislators to call and ask questions and complain. He was further told of the legislative pressure that occurred when Burk Voigt was selected. Jackson further explained to Woods that there are still a lot of

objections to hiring a Clerk of Court from out of state. Woods then acknowledges that it had not registered on him that they had intended for him to break the law and not hire the best qualified, but hire only from Alaskan candidates when he and Voigt hired personnel for the Clerk's of Court office but, if it had registered, he would have complied. Jackson follows up with the reinforcement that he, Ronald Woods, had been warned as far as the senior administrators were concerned. Then, the following day, March 5, 1992 (see Interview of Ronald Woods by Karrold Jackson on March 5, 1992, pp. 6-8, 22-35), Ms. Jackson makes it crystal clear to Woods, since she apparently does not believe he listens between the lines very well, that Woods is seen as a supporter of Burk, his Clerk of Court, and that Presiding Judge Savell had told people that with Ronald Woods as the ACA, you could now trust Wood, not Burk. The inference here is clear: You, Ronald Woods, either line up with Presiding Judge Savell and the Court Administration or, as Ms. Jackson politely put it to Ronald Woods, "Your destiny is tied to the morale of this court." A few moments later, Ms. Jackson threatens to remove all hiring authority from Ronald Woods and makes it very clear to him that Voigt will never have any more hiring authority under her. Ronald Woods finally gets the message and he quickly comes to the conclusion that he must support the firing of Voigt and agrees to do so.

c. that another part of this pattern is Judge Richard Savell's complete reversal of the recommendations of his staff on the grievance of Ms. Demoski, whose grievance again created pressure about out of state hires. I have

reviewed the same staff reports and investigatory interviews that are apparently those which Judge Savell reviewed in making his decision. I do not find sufficient support to reach the same conclusion as Judge Savell's, whose opinion was that Ms. Demoski's grievance was valid and that the fault lies with the Clerk of Court, Burk Voigt.

d. that a pattern of abusive and illegally motivated decision making is evident. The hidden agenda is also now clear: Burk Voigt has caused political heat on the court by hiring an out of state candidate; he will not change his behavior and therefore is a political liability for the senior administrators in the court system; his own hiring is a political problem in itself; he must be fired and they will use morale issues as the pretext.

e. that Burk Voigt was wrongfully discharged in retaliation for his refusal to hire only Alaskans, his criticism of the mismanaged hiring efforts of Judge Savell to hire a new ACA and that his own hiring is a continual political liability for senior court administrators. It is also my professional opinion that the summary firing, of a permanent employee in this case, was not justified.

/s/ John N. Taylor
John N. Taylor

SUBSCRIBED AND SWORN to before me this 24th day of August, 1993.

/s/ Thomas R. Wickwire
NOTARY PUBLIC
IN AND FOR ALASKA
My commission expires: 1-24-95

APPENDIX H

[SEAL]

SUPERIOR COURT
STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

Chambers of
RICHARD D. SAVELL,
Judge

804 BARNETTE STREET
FAIRBANKS, ALASKA
99701

March 24, 1992

J. Burk Voigt, Clerk of Court
Alaska Court System
604 Barnette Street, Room 342
Fairbanks, Alaska 99701

Dear Mr. Voigt:

We are advising you of our intention to dismiss you from your position as Fairbanks Clerk of Court effective March 26, 1992, at 4:30 p.m. You will be placed on paid leave until that time. The reasons for your dismissal are as follows:

1. You have engaged in a consistent pattern of making inappropriate statements to subordinate employees in the Fairbanks court. You have openly discussed with these employees problems you have had with and your criticisms of other employees' work performance. You have made statements of criticism of supervisors to their subordinate employees.

The statements of criticism have been made to employees in the clerk's office about other employees both inside and outside of the clerk's office. These statements have had an ever-increasing demoralizing effect on

the employees in the clerks' office. Your actions have created an oppressive and hostile work environment. These statements have subjected the court system to possible liability for claims from employees based upon unfair treatment and discrimination.

You received a written reprimand from the presiding judge dated May 15, 1991, citing, among other things, how your action in dealing with court system employees locally had spread disharmony and had operated to undermine attempts at improving case handling and curing some of the serious problems plaguing the court system in Fairbanks. Cited were your statements to supervisors and other court employees designed to torpedo the selection of Judith Cramer as ACA and to undermine any chance she had of being accepted in the building and succeeding in her job. You were warned that a failure to correct these deficiencies would lead to further disciplinary action, up to and including your dismissal.

Numerous additional inappropriate statements and actions in dealing with subordinate employees have recently come to light.

A. In August 1991, Personnel Director Karrold Jackson investigated the circumstances of a possibly coerced transfer of a civil clerk to records. It was found that you discussed a supervisor's poor performance with one of the supervisor's subordinate employees. Specifically, on July 26, 1991, you discussed Linda Chizmar's poor job performance with Martin Guerrero, one of her subordinates.

B. On March 23, 1992, an employee recounted statements by you in your dealings with her and your staff that you felt that the women in the office were like children and needed to be treated like children. Such a statement indicates a gender bias which is inappropriate, discriminatory, and has demoralizing effects.

C. On March 23, 1991, four employees of your office repeated that you had discussed your dissatisfaction with the performance of Civil Supervisor Linda Chizmar with each of them on numerous occasions. These employees include supervisory and non-supervisory employees who had no interest or reason for involvement in any problems that you were discussing.

D. On March 23, 1992, members of your supervisory staff disclosed to me that you have forbidden them from smoking together or mingling on their breaks to preclude communication between them on office matters of common interest.

E. On March 23, 1992, one of your supervisors advised me that last week you told her that she was to be removed from the Revisions in Progress (RIP) committee. She reports that she was warned by you that "it wouldn't be good" for her to disclose to or discuss with anybody that you were ordering her removal from the committee. She states you then said "you know what I mean," in warning that "it wouldn't be good." She felt threatened by your statement, tone and appearance, to the extent that she feared for her job and called the Personnel Director from her home during the evening.

F. On March 23, 1992, it was reported by one of your employees that you referred to your clerks in the civil department as "dumb clerks" when recruiting her for her position.

G. On March 12, 1992, in response to a memorandum from his secretary, Judge Savell sent a memorandum to all Fairbanks court employees seeking their opinions on the subject of file organization and restructuring. Upon your discovery of the memorandum, the employees in your office were subjected to a hostile, accusatory reaction, resulting in your interrogation of one employee to discover who had violated your edict forbidding staff from talking to the presiding judge. Your actions placed this employee in fear of retaliatory action.

H. I have just been advised that you ordered employees to "play dumb" in their communications with the new ACA.

2. You have misused court resources for improper and harmful purposes. On March 23, 1992, one of your subordinates reported that on numerous occasions you specifically directed her or another employee to execute and/or print computer generated reports or to shut down the computer at times that you knew would disable other departments/users and that you did so with the specific intent of harming court operations. She reported that you would routinely discard these reports without review or use, explaining that your sole purpose was to deny computer system access by other users or to monopolize printer equipment in order to establish your control thereof.

3. You have engaged in insubordinate behavior. Employees from your office have reported that you have been openly critical of the presiding judge's decision in the matter of the grievance filed by Roberta Demoski. You have made statements to subordinate employees that the presiding judge violated the personnel rules in ruling upon the grievance. You have stated that the judge's handling of the matter violated the merit system of employment. You have discouraged your employee from communicating their ideas and concerns to the presiding judge, in spite of the presiding judge's efforts to develop an open and positive work environment. You have attempted to undermine the presiding judge's action in front of subordinate employees.

4. You have continued to engage in poor personnel and supervisory practices despite the previous warnings from the personnel director and from the presiding judge. You have actively discouraged your employee from applying for other jobs within the organization. Employees have now reported that they were pressured by you into withdrawing applications for certain positions.

You have created the appearance of having preselected applicants for positions within your office. You have done this by interviewing the successful candidate without the other members of the interview panel present. And you have done this by disclosing your selection of some candidates before the selection and interview process was completed.

The recent grievance disclosed that inappropriate statements were made by you to an applicant for positions in your office. You have revealed the contents of confidential personnel grievance documents to a number of employees who did not have a reason to be involved in or know the existence of the grievance and its resolution. By doing so, by expressing your opinion about the lack of merits of the grievance, and by disparaging the ability of the grievant, you have undermined the ability of the grievant to survive in the work environment of the clerk's office.

You have created a work environment in which your employees fear retaliation for expressing opinions contrary to your opinions. As a result, many employees fear that they could lose their jobs with the court system at any time. Further, you have used the chain of command to stifle employees to the point of intimidation while, at the same time, you have ignored the chain of command beneath you.

It has also just come to my attention that you have violated Personnel Rule 6.05 governing overtime compensation. In so doing, you have exposed the court system to significant potential liability. During your tenure as Acting Area Court Administrator, you both permitted and directed an employee to perform various tasks which resulted in her accumulation of substantial overtime over a long period of time. Under Personnel Rule 6.05.04, you were not to permit employees eligible for overtime compensation to work additional hours beyond the employee's regularly scheduled work week without compensation. As the rule clearly states, an employee cannot

"volunteer" to work additional hours without compensation.

We believe that, given your past performance, any one of the above cited reasons would justify your termination. Additionally, please be advised that the specific instances set forth herein and justifying your termination are intended as examples only and are not necessarily all inclusive.

You have a right to request a pre-termination hearing, at which you may explain why you believe the dismissal is unjust, and you may call witnesses to support your position. This pre-termination hearing would normally be scheduled before me, as the area court administrator's superior. However, since I have participated in the investigation of the basis for your dismissal, I will ask Chief Justice Rabinowitz to designate another presiding judge for the purpose of holding a pre-termination hearing, should you request one. A pre-termination hearing, if requested, will take place within one working day of your receipt of this notification of intent to dismiss. You may request an extension of time if one day is not sufficient. A decision on the pre-termination hearing is due within one working day of the hearing. If you do not request a pre-termination hearing, or if the pre-termination hearing officer determines that the termination is warranted, you will be given a final notice of dismissal. You will then have a right to file a formal grievance in accord with Personnel Rule 9.05.

From this point forward, you are not authorized to enter or be within any non-public areas of the courthouse. You are directed to immediately surrender any keys or court system property in your possession.

Regretfully,

/s/ R D Savell
RICHARD D. SAVELL
Presiding Judge

/s/ Ronald J Woods
RONALD J. WOODS
Area Court Administrator

cc: Personnel Director

Supreme Court, U.S.
FILED
APR 18 1996
CLERK

(2)

No. 95-1529

In The

Supreme Court of the United States

October Term, 1995

J. BURK VOIGT,

Petitioner,

v.

RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON, STEPHANIE COLE, ARTHUR SNOWDEN II, and STATE OF ALASKA

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. KOZIOL
Counsel of Record for Respondents
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Anchorage, Alaska 99501
(907) 258-7706

135 AR

QUESTIONS PRESENTED FOR REVIEW

(1) Where the content and circumstances of the speech are undisputed and where the Court of Appeals has applied the *Pickering* balancing test, has a compelling reason for granting the petition been shown if petitioner disagrees with the weight given the free speech interest?

(2) Does an Alaska resident have standing under 42 U.S.C. § 1985(3) to assert the constitutional rights of non-residents when the only contact with such non-residents is to occasionally consider them for hire as State employees?

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The tentative decision of the United States District Court dated January 31, 1994 has not been reported. A copy of that decision is set forth at Appendix I. (App. 75-160)

COURT RULE INVOLVED

Respondents have cited to United States Supreme Court Rule 10. Since this rule is lengthy, pursuant to Supreme Court Rule 24.1(f), the pertinent text is set forth at Appendix J. (App. 161-162)

STATEMENT OF THE CASE

The Court of Appeals has accurately and ably set forth the facts in its decision. (App. 3-7) A more extensive discussion of the facts is found in the District Court's Tentative Decision issued on January 31, 1994 and referred to in the District Court's Final Decision (App. 27, 75-160)

The Court of Appeals found that J. Burk Voigt's (Voigt) criticisms of Judge Richard Savell's handling of the two internal personnel matters was an extension of a personal dispute with Judge Savell. (App. 11) Voigt memorialized this earlier dispute in a memorandum dated January 17, 1991. (App. 3, 163-167)

The Court of Appeals referred to affidavits from court employees which set forth the disruption caused by Voigt's criticisms. (App. 13) These affidavits show the harm caused by Voigt's comments. (App. 180-196)

Finally, Voigt criticized Judge Savell's decision to uphold a grievance filed by an Alaska resident who complained about Voigt's refusal to hire her. (App. 4) Judge Savell issued a written decision upholding this grievance. (App. 168-179)

SUMMARY OF ARGUMENT

Voigt's 42 U.S.C. § 1983 claims were properly denied because the speech involved should not be constitutionally protected. The Court of Appeals correctly applied the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Voigt would balance the interests differently. However, given that Voigt's criticisms involved two internal personnel matters, the Court of Appeals correctly concluded the employer's interests were paramount. Voigt's claims of unfair treatment are properly addressed by State claims in State court. Voigt cannot show a compelling reason for the petition for writ of certiorari (Petition) to be granted.

Voigt's 42 U.S.C. § 1983 claims were viewed in the light most favorable to Voigt. The content and circumstance of Voigt's speech

were resolved in Voigt's favor. Any test in *Waters v. Churchill*, 114 S. Ct. 1878 (1994) is, therefore, inapplicable. Even if applicable, Voigt benefitted by not having the test applied. Furthermore, Voigt's assertion that *Waters* should apply must be rejected because it was never raised in the lower courts.

Voigt's 42 U.S.C. § 1985(3) claim was properly denied because Voigt, an Alaska resident, lacks third-party standing to advance the constitutional rights of non-residents of Alaska.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED THE *PICKERING* BALANCE.

The Court of Appeals applied the balancing test set forth in *Pickering*, 391 U.S. at 568 and concluded Voigt's speech was not entitled to constitutional protection. (App. 2, 12) Voigt asserts greater weight should have been given his free speech interests. (Petition at 8) This is not a compelling reason to grant his petition. *See*, Supreme Court Rule 10.

Voigt's speech criticizing Judge Savell involved two personnel decisions. Voigt's animosity to Judge Savell predated the personnel decisions. (App. 3) Voigt's criticisms of Judge Savell severely damaged

office harmony and undermined Judge Savell's authority. (App. 13) Voigt's reference to Judge Jay Hodges' affidavit is not contrary. (Petition at 5, 7) Judge Hodges does not acknowledge he knew of Voigt's statements nor does he discuss their impact. (App. 52-56)

The Court of Appeals recognized that Voigt's assertions of unfair discrimination against non-residents and unfair treatment of job applicants in general touched on a matter of public concern. (App. 12) Voigt suggests more weight should have been given to the allegation of discrimination because it involves underlying constitutional issues. (Petition at 8)

Voigt likely errs as to any underlying constitutional issue. A state may impose a bona fide residency requirement as a condition of public employment. *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645, 646-647 (1976), (per curiam). Public employment is not a fundamental right under the Equal Protection Clause and the state may have bona fide residency requirements that are limited to public employment, services or funds. *United Bldg. and Constr. Trades v. Mayor of Camden*, 465 U.S. 208, 219 (1984). A bona fide residency requirement, as opposed to a durational restriction, does not infringe on the constitutional right of interstate travel. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 904 n.3 (1986).

Given the damage done to the employer's interests, the Court of Appeals correctly concluded Voigt's speech was not entitled to constitutional protection.

Respondents prevailed based upon the District Court's grant of summary judgment. (App. 8) The evidence was viewed in the light most favorable to Voigt. (App. 8)

Thus, any factual dispute about what the speech was, its tone, or the listeners' reaction was resolved in Voigt's favor. The holding in *Waters*, 114 S. Ct. at 1884, 1889 (public employer's reasonable belief that speech is unprotected permits employer to punish employee for that speech) is inapplicable.

The *Waters* holding rejected the summary judgment standard test as giving insufficient weight to the public employer's interest in efficient government decision making. *Waters*, 114 S. Ct. at 1888. Therefore, contrary to Voigt's assertions, Voigt benefitted by the failure to apply the *Waters* test.

The lower courts never addressed the question of whether Voigt could prove the protected speech was a "substantial" or "motivating" factor in his termination. Nor was the issue resolved whether the employer had shown that Voigt would have been fired even if the protected speech had not occurred.

See, Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977).

These issues were not addressed because Voigt's speech was held not entitled to federal protection. Voigt was free to pursue his State claims, including wrongful termination, in State court. (App. 8) Voigt's reliance upon his management consultant's affidavit is misplaced and better cited in State court. (App. 6, 37 n.4)

Voigt alleges his employer failed to reasonably investigate "matters" prior to his termination, citing *Waters*. (App. 1, 9) As stated above, since there was no dispute as to Voigt's speech, *Waters* is inapplicable. Even if applicable, Voigt raises this issue for the first time in his petition. The issue was not presented and argued to either the District Court or Court of Appeals.

As a general rule, a federal appellate court will not consider an issue not passed upon below. The basis for the rule is that the parties should have an opportunity to offer all evidence relevant to the issues so the litigants will not be surprised on appeal by a final decision on issues of which they had no opportunity to present evidence. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), (citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). Therefore, this argument should not be considered.

The Court of Appeals correctly denied Voigt's 42 U.S.C. § 1983 claims.

II. VOIGT DOES NOT HAVE STANDING UNDER 42 U.S.C. § 1985(3) TO ASSERT THE CONSTITUTIONAL RIGHTS OF NON-RESIDENTS OF ALASKA.

Voigt's 42 U.S.C. § 1985(3) claim is based upon the premise that non-residents of Alaska competing for State public employment are entitled to special federal protection. The Court of Appeals never decided this issue. (App. 21, 24) Rather, the Court of Appeals found that Voigt lacked third-party standing to make the claim. (App. 24)

Voigt suggests he has primary or first-party standing. (Petition at 10-11) However, Voigt was an Alaska resident at all pertinent times. (App. 21) Thus, Voigt is not a member of the class he asserts is entitled to federal protection. Voigt's self-characterization as a "*de facto* non-resident" is erroneous. (Petition at 11) There is no factual basis for his assertion he was perceived to be a non-resident after residency was obtained. (Petition at 2)

Voigt has no third-party standing because he has no special or close relationship to non-residents of Alaska. Voigt satisfied Article III's case-or-controversy requirement, but failed the "prudential" test. *See, Caplin*

& Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3 (1989). (App. 22-24)

The Court of Appeals correctly found Voigt's only connection to non-residents is that he was occasionally in a position to hire a non-resident for employment with the State court system. (App. 23) This is not a sufficiently close relationship to the class of non-residents to conclude Voigt would be an effective advocate on their behalf. In fact, Voigt is a member of the class (Alaska residents) he seeks to disfavor.

The petition should be denied. The Court of Appeals properly stated and applied the correct rule of law to undisputed facts.

CONCLUSION

Voigt's Petition for Writ of Certiorari should be denied.

DATED at Anchorage, Alaska, this 12th day of April, 1996.

FRANK S. KOZIOL
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Respondents
618 Christensen Drive
Anchorage, Alaska 99501
(907) 258-7706

No. 95-1529

In The

Supreme Court of the United States

October Term, 1995

J. BURK VOIGT,

Petitioner,

v.

RICHARD D. SAVELL, RONALD J. WOODS, KARROLD JACKSON, STEPHANIE COLE, ARTHUR SNOWDEN II, and STATE OF ALASKA

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

APPENDIX TO
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

J. BURK VOIGT,	)
	)
Plaintiff,	)
	)
v.	)
	)
RICHARD D. SAVELL, RONALD J. WOOD, KARROLD JACKSON, STEPHANIE J. COLE, ARTHUR SNOWDEN II, and STATE OF ALASKA,	)
	)
Defendants.	)

Case No. F92-012 Civil (JKS)

ORDER

(Filed February 2, 1994)

Defendants moved for partial summary judgment on Plaintiff's federal retaliatory discharge claims (Docket No. 87), Plaintiff filed his objection to the motion (Docket No. 101), and Defendants replied (Docket No. 112). The parties have not requested oral argument. Nevertheless, because this motion presents issues that implicate developing law, the Court feels that oral argument would be helpful to provide a forum in which questions can be answered and the record clarified as to troubling points. Therefore, pursuant to Local Rule 5(C), the Court will hear oral

argument on the motion for partial summary judgment on **Monday, March 28, 1994, at 2:00 p.m. in Fairbanks.**

In order to aid the parties in preparing for oral argument, the Court has prepared a tentative decision regarding Defendants' motion. The tentative decision discussed below is not intended to chill or discourage oral advocacy or inhibit counsel in vigorously representing their positions. Its purpose is to focus the parties' attention on any errors of fact or law that the Court may be laboring under and thus provide an opportunity at argument to correct errors, prepare an accurate record, and assure that the material facts and the controlling law are completely developed. Following oral argument, the Court may modify or change its tentative decision if it relied on erroneous factual or legal conclusions.

CASE STATUS

J. Burk Voigt was the Clerk of Trials Court and Assistant Area Court Administrator for the Fourth Judicial District of Alaska at Fairbanks from July 17, 1989, until his termination on March 26, 1992.[1] Voigt

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[1] The reasons for Voigt's discharge were articulated in a letter of March 24, 1992, informing Voigt of the intention to dismiss him effective March 26 at 4:30 p.m. Docket No. 101, Ex. Q-1. The reasons included the

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following:

1. engaging in a consistent pattern of making inappropriate statements to subordinate employees, resulting in a demoralizing effect on employees and subjecting the court system to potential liability; including the following:

-- statements designed to "torpedo" the selection of Judith Cramer as Area Court Administrator;

-- discussing a supervisor's poor performance with a subordinate employee of that supervisor;

-- statements indicating gender bias;

-- expressing dissatisfaction with a Civil Supervisor with other supervisory and non-supervisory employees who had no interest or reason for involvement;

-- prohibiting staff from smoking together or mingling during office breaks;

-- removing a supervisor from a Revisions in Progress committee and warning her not to disclose or discuss the removal;

-- referring to civil clerks as "dumb clerks";

-- placing employees in fear of retaliatory action after learning that some might have violated Voigt's "edict" forbidding staff from talking to the presiding judge;

-- ordering employees to "play dumb" in communicating with the new Area Court

has brought an action against each of the

Administrator;

2. misusing court resources for improper and harmful purposes; for example, ordering long computer-generated reports for no reason other than to deny others computer system access and to assert control over the system;

3. engaging in insubordinate behavior by openly criticizing the presiding judge's decision in the grievance filed by Roberta Demoski, discouraging employees from communicating with the presiding judge, and attempting to undermine the presiding judge's action in front of subordinate employees; and

4. engaging in poor personnel and supervisory practices, such as:

-- discouraging employees from applying for other jobs within the Clerk's Office;

-- creating the appearance of having preselected applicants;

-- undermining the ability of Demoski to survive in the work environment of the Clerk's Office;

-- creating a work environment in which employees fear retaliation for expressing opinions contrary to Voigt's;

-- violating Personnel Rule 6.05 regarding overtime compensation by allowing an employee to accumulate substantial overtime hours without compensation.

following Defendants in his or her individual capacity: Judge Richard D. Savell, the presiding judge of the Fourth Judicial District at Fairbanks since January 1, 1991; Ronald J. Woods, the Area Court Administrator for the Fourth Judicial District since November 18, 1991; Karrold Jackson, the Personnel Director for the Alaska Court System since June 1, 1983; Stephanie J. Cole, the Deputy Administrative Director and senior lawyer on the administrative staff for the Alaska Court System; Arthur H. Snowden II, the Administrative Director of the Alaska Court System since September 9, 1973; and the State of Alaska.[2]

Voigt's Second Amended Complaint at Docket No. 100 includes both federal and state law claims. Earlier, this Court dismissed all claims against the State of Alaska for damages, and all federal claims against the remaining Defendants except federal retaliatory discharge claims. Docket No. 56. The Court advised the parties that it will not consider the state law claims until the

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[2] There is some confusion as to whether Snowden and Cole are actually parties. *See* Docket No. 112, p. 27, 31-32. Voigt's Second Amended Complaint does not include Snowden or Cole under "Parties," but does refer to them as defendants in Counts XII and XIII. Docket No. 100. For purposes of this tentative decision, I will treat them as parties.

federal retaliatory discharge claims are decided. Docket No. 56.

In his federal retaliatory discharge claims, Voigt alleges that the Defendants fired him because Voigt openly criticized Judge Savell's manner of hiring a new Area Court Administrator and because Voigt hired a nonresident applicant for the Court Clerk I position in the Fairbanks Records Department instead of a resident applicant. Voigt contends that the Defendants' retaliatory discharge deprived him of his constitutional right to free speech, violating 42 U.S.C. § 1983. Voigt also contends that the Defendants conspired to discriminate against out-of-state applicants, restricting their right to travel and violating 42 U.S.C. § 1985(3).

The Court has ordered that the issue of whether or not the federal claims are barred by the affirmative defense of qualified immunity must be addressed at an early stage, before significant discovery. Docket Nos. 80, 89. If the issue of qualified immunity is decided in favor of the Defendants, then the Court will consider remanding Voigt's remaining state law claims to the state court. If the issue is decided in Voigt's favor, then discovery will proceed. If the Court determines that a trial on the federal claims is necessary, it may decide to consider the state law claims at the same time (assuming Voigt is

entitled to *de novo* review). Docket No. 80. However, the Court discourages any attempt by the parties to use "marginal federal claims to bootstrap state claims into federal court." *Id.*

DISCUSSION

I. QUALIFIED IMMUNITY GENERALLY

A. *Legal Standards*

Qualified immunity protects government officials performing discretionary functions from liability for civil damages, unless the official's conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It is presumed that a defendant official is entitled to qualified immunity. *Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir. 1991). The immunity given to the official is immunity from suit, not simply a defense to liability, and therefore immunity questions should be resolved at the earliest possible stage in litigation. *Hunter v. Bryant*, 112 S. Ct. 534, 536 (1991). Thus, the issue of immunity is generally a legal question for the court to decide, not the jury. *Id.* at 537; *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993).

In determining whether or not an official is entitled to qualified immunity, the Ninth Circuit has adopted a two-part analysis: (1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed that his conduct was lawful? *Act Up!/Portland*, 988 F.2d at 871; *Hemphill v. Kincheloe*, 987 F.2d 589, 592 (9th Cir. 1993).[3]

Although these are questions of law, the plaintiff in a retaliatory discharge action bears the burden of proving that the right allegedly violated was clearly established at the time of the official's conduct in order to overcome the presumption that the defendant official is immune from damages. *See Camarillo*, 998 F.2d at 639; *Elder*, 975 F.2d at 1392; *Romero*, 931 F.2d at 627. This means that the plaintiff "must show that the particular facts of his case support a claim of clearly established right, and he loses if he does not come forward with statutory or deci-

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[3] *Cf. Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 199[illegible]) ("The qualified immunity test necessitates three inquiries: (1) the identification of the specific right allegedly violated; (2) the determination of whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue").

sional law on which the court can find that the constitutional right allegedly violated was clearly established." *Elder*, 975 F.2d at 1393. The law is "clearly established" when "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Camarillo*, 998 F.2d at 640 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

If the plaintiff carries this burden, then the officials must prove that their conduct was reasonable even though it might have violated constitutional standards. *Romero*, 931 F.2d at 627. The court may assert its discretionary power to permit limited discovery to determine if there are genuine issues of material fact surrounding the reasonableness of the official's conduct. *Id.* at 628.

B. *Waiver*

Voigt contends that the Defendants have waived their qualified immunity defense and objects to the Court's assertion of the defense *sua sponte*. Docket No. 101, pp. 6-13. Voigt admits that the Defendants raised the affirmative defense of qualified immunity initially in their answers to Voigt's complaints, but complains that the Defendants did not pursue the defense in subsequent pleadings until prompted by the Court's Order at Docket

No. 80. Voigt further contends that the Defendants' memorandum at Docket No. 87 inadequately briefs the issue, violating Local General Rule 5(B)(1)(b). Voigt does note that the Ninth Circuit permits the defense to be raised for the first time at summary judgment in the absence of a showing of prejudice. *Camarillo*, 998 F.2d at 639. However, Voigt contends that he has been "philosophically" prejudiced by the Court's prompting of the Defendants.

The Defendants respond that their motion for partial summary judgment on the issue of qualified immunity is still early in the discovery process and that they never intended to abandon the defense. Docket No. 112. They argue that Voigt has not demonstrated any prejudice from the delay in deciding the issue. The only deposition taken in the case so far has been the Defendants' deposition of Voigt in order to determine the basis for his free speech claims. Docket No. 112, p. 2. Furthermore, the Defendants note that contrary to Voigt's contention, they did cite to the seminal case on qualified immunity, *Harlow*.

The Court has not specifically rejected Voigt's waiver contention, but has explained that a waiver requires an intentional and voluntary relinquishment of a known right. Docket No. 89. It is clear that the Defendants never intended to waive the defense of qualified immunity. Furthermore, Voigt

suffers no real prejudice; unlike the factual situation in *Camarillo*, the Defendants here asserted their affirmative defense of qualified immunity in their answers to Voigt's complaints. Voigt should not be surprised to find the issue raised at summary judgment. Thus, case law supports finding that Defendants have not waived the defense. *See, e.g., Camarillo*, 998 F.2d at 639.

C. *Availability in a § 1985(3) Action*

Voigt contends that public officials are not entitled to qualified immunity for an alleged conspiracy under 42 U.S.C. § 1985(3). Docket No. 101, p. 72. He cites *Burrell v. Board of Trustees of Georgia Military College*, 970 F.2d 785, 794 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993). In *Burrell*, the court explained that because public officials are not liable in a § 1985(3) action unless their actions were motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus," they enjoyed additional protection against § 1985(3) actions not available to them in § 1983 actions. The court opined that denying officials qualified immunity under section 1985(3) would not threaten "the breathing space they need for making discretionary decisions," since invidious discrimination "has no place in public policy and any actions by public officials based on such animus deserve to be chilled." *Id.* at 794.

The Ninth Circuit has not addressed this issue specifically. However, qualified immunity has been applied where the defendant attempted to assert a conspiracy claim under § 1983 and § 1985. *See Hewitt v. Grabicki*, 794 F.2d 1373, 1381 & n.5 (9th Cir. 1986). As discussed below, it certainly is not clearly established under federal law that nonresident applicants seeking public employment are a protected class within the meaning of a § 1985(3). If it turns out that they are, should the officials be liable for damages? Qualified immunity would preclude plaintiff's suit for civil damages, but not plaintiff's suit in equity for prospective injunctive relief. *See Wheaton v. Webb-Petett*, 931 F.2d 613, 620 (9th Cir. 1991) (noting that section 1983 plaintiff may seek prospective injunctive relief from state officials who have personal immunity from damages). In the absence of a clear holding on the issue by the Supreme Court, this Court considers the qualified immunity defense to be available in a § 1985(3) action.

II. WAS THE LAW SO CLEARLY ESTABLISHED THAT A REASONABLE OFFICIAL SHOULD HAVE REALIZED THAT CONSPIRING TO DISCHARGE VOIGT FOR REFUSING TO DISCRIMINATE AGAINST NONRESIDENTS APPLYING FOR PUBLIC EMPLOYMENT WOULD VIOLATE 42 U.S.C. § 1985(3)?

A. *Relevant Facts*

Voigt's claim under 42 U.S.C. § 1985(3) is predicated on his belief that the

Defendants conspired to discharge Voigt because he refused to follow the Defendants' allegedly improper policy of discriminating against nonresident applicants for jobs with the Alaska Court System. Voigt's belief stems from the following facts.

On February 7, 1992, Voigt hired an out-of-state applicant for the position of Court Clerk I in the Records Department, Margaret Crawford/Perron, instead of a court clerk from Galena, Alaska, Roberta Demoski. Docket No. 101, Ex. H, p. 13; Ex. J-17.[4] Apparently, in making his decision, Voigt considered Personnel Rule 3.09 and Personnel Rule 3.13.02. *Id.*[5] He felt that Crawford/Perron,

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[4] Both previously applied unsuccessfully for the Court Clerk II position in the Criminal Department. Dana Hoffman/Evans, a clerk in the Records Department, received the job.

[5] Personnel Rule 3.09 permits consideration of an applicant's education, experience, record of accomplishment, knowledge, skill, capacity, intelligence, character and attributes to the extent such criteria are relevant to the position. Docket No. 101, Ex. K, p. 24-25. Personnel Rule 3.13.02 requires that "[a]mong equally qualified applicant's preference shall be given to each tenured employee in the classified service who is competing for a promotion." Id. (sic) at 26. Voigt notes

who had previously worked as a law clerk for two of the Fairbanks judges, would make significant contributions because of her legal experience and education and first-hand experience with the court and judges. Docket No. 101, Ex. E-2. She was also the recommended choice of the Records Supervisor, Jan Stroffolino, who had listed the top three candidates-- none of whom was Demoski. Docket No. 101, Ex. J-15.[6]

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that the Galena clerk was classified as a range 10 position, while the Fairbanks records clerk was classified as a range 8 position. Thus, Voigt concluded that Rule 3.13.02 did not apply because Demoski was not competing for a promotion. Docket No. 101, Ex. H, p. 13.

[6] Voigt contends that Demoski was not the best qualified applicant for the Records Clerk position, citing statements made by Sharon Hotrum, the Chief Deputy Clerk. Docket No. 101, p. 49. In a recorded interview with Karrold Jackson, Hotrum stated that although she initially favored Demoski because she was an Alaska resident, she conceded that Demoski's answers to questions regarding her abilities were weak. Docket No. 101, Ex. O-6, pp. 9-10. However, Voigt appears to take Hotrum's statements out of context. Hotrum was never involved with the interview process for the Records Clerk I position; she only interviewed applicants for the Criminal Clerk II position. Docket No. 101, Ex. O-6, p. 5. Consequently, her opinion did not address

Demoski filed a grievance following Voigt's decision, and on February 25, 1992, Defendant Judge Savell issued a decision concluding that her grievance was valid. He found that Voigt relied upon improper criteria, applied impermissible factors and ignored Personal [sic] Rule 3.13.02. Docket No. 101, Ex. E-5, p. 6.[7] He ordered that Demoski be transferred to the Fairbanks Clerk's Office for the first available position for which she was qualified. *Id.*

Pending the grievance decision, on February 13, 1992, Defendant Snowden ordered Defendant Jackson to conduct an investigation into the recent hirings at the Fairbanks Clerk's Office. Snowden addressed four major concerns, one of which was whether or not "appropriate deference" was given to "in-house applicants." Docket No. 101, Ex. J-19. The affidavits of Judge Hodges, Crawford/Perron, and Voigt all state that Defendant Woods discussed the Demoski grievance with Snowden and requested that Snowden put in writing any

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whether or not Demoski was the better qualified applicant for the records clerk position.

[7] Judge Savell also found that Voigt's statements regarding the hiring of the Fairbanks records clerk (Hoffman/Evans) for the Court Clerk II position in the Criminal department suggested that an improper preselection had occurred. Id. [sic] at 4-5.

policy of not hiring applicants from out-of-state, and that Snowden responded that he could not put the policy in writing because it would be illegal. Docket No. 101, Ex. F, G, and H.

In her investigation, Jackson conducted recorded interviews with various employees of the Clerk's Office during March 1992.[8] Voigt cites passages from Jackson's interviews with Woods on March 4-5, 1992, revealing that Jackson warned the unsuspecting Woods that there was strong resistance to hiring non-residents;[9] Jackson reminded Woods of

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[8] Voigt refers to the affidavit of John Taylor, an associate professor of management at UAF, who opines that these interviews reveal the existence of a conspiracy to discharge Voigt in retaliation for his refusal to hire only Alaskans. Docket No. 101, p. 36; Docket No. 101, Ex. I-1, pp. 5-8. In Judge Fitzgerald's order of July 17, 1992, denying Voigt's motion for a preliminary injunction, Judge Fitzgerald refused to give much weight to Taylor's testimony because the professor had insufficient information upon which to base an opinion. Docket No. 24. However, in his affidavit of August 23, 1993, Taylor states that he has since been supplied with a substantial volume of new materials detailing the events that took place. Docket No. 101, Ex. I-1, p. 2.

[9] However, as the Defendants point out, Jackson also noted that she personally did not

Defendant Cole's instruction to avoid selecting from outside Alaska; Woods had failed to understand the ruckus that could result from hiring out-of-state; Jackson warned that Woods must take full control to assure Voigt changed his behavior or Woods could lose his job. Docket No. 101, Ex. O-4, pp. 42-47; Ex. O-5, pp. 22-27.

Voigt contends that Judge Savell was part of the Snowden-Jackson-Cole conspiracy to unlawfully discharge Voigt, citing Jackson's telephonic interview with Accounting Supervisor, Shirley Nash, on March 11, 1992. In that interview, Jackson states that she has spoken with Judge Savell several times and feels that he is very interested in helping the disgruntled employees of the Clerk's Office. Docket No. 101, Ex. O-22, p. 24. Voigt also cites Judge Savell's memorandum to court employees on March 12, 1992, inviting their comments on a new filing system; the employees were instructed to ignore the chain of command and submit comments directly to the judge by March 24; the submissions could be anonymous. Docket No. 101, Ex. N-1.5. Voigt argues that the invitation for comments on the filing system was a pretense for soliciting negative comments about Voigt. Docket No. 101, p. 44-45.

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advocate Alaska-hire. Docket No. 101, Ex. O-4, p. 45.

On March 24, 1993, Woods and Savell issued to Voigt their intent to dismiss letter, effective March 26 at 4:30 p.m. Docket No. 101, Ex. Q-1. Among other things, the letter referred to Voigt's criticism of Judge Savell's decision on the Demoski grievance. *See* footnote 1, *supra*. Voigt received a final notice of dismissal on March 27, 1992, following a pretermination hearing. Docket No. 101, Ex. Q-3.

B. *Legal Discussion*

1. *Preclusion by Qualified Immunity*

To establish a violation of 42 U.S.C. § 1985(3), the plaintiff must prove the following elements: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *United Bhd. of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 828-29 (1983). To determine whether or not qualified immunity precludes Voigt's § 1985(3) claim, the Court must determine whether or not the law was sufficiently clear that a reasonable official would know that conspiring to discharge Voigt for refusing to follow an

implied policy of discriminating against nonresidents applying for public employment would violate the second element of § 1985(3).

a. *unlawful discrimination*

The second element of § 1985(3) requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). If the phrase "perhaps otherwise class-based" is to be extended beyond race, it "unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." *Bray*, 113 S. Ct. at 759. In *Scott*, the Supreme Court analyzed the legislative history of § 1985(3) and concluded that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." 463 U.S. at 836. However, the Court determined that § 1985(3) could not, in any event, be construed to reach conspiracies "motivated by economic or commercial animus," such as conspiracies against nonunion employees. *Id.* at 838. More recently, the Court held that discriminating against antiabortionists "is not the stuff out of which a § 1985(3) 'invidiously discriminatory animus' is created." *Bray*, 113 S. Ct. at 762.

In the Ninth Circuit, § 1985(3) is extended beyond race if the courts have designated the class in question as a suspect or quasi-suspect classification or if Congress has indicated through legislation that the class requires special protection. *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992) (citing *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985)); *See also Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 720 (9th Cir.), *cert. denied*, 454 U.S. 967 (1981) ("§ 1985(3) applies only to groups that require and warrant special federal assistance in protecting their civil rights").

Voigt contends that discriminating against nonresident applicants is the type of invidious discrimination that violates § 1985(3). He cites *Hicklin v. Orbeck*, 437 U.S. 518 (1978), which held that the Alaska "local hire" statute requiring all pipeline-related contracts source of evil to justify a flat employment preference. *Id.* at 527. That case, however, does not imply that nonresidents are a suspect or quasi-suspect class protected from discrimination under § 1985(3). As the Defendants point out, the discrimination against nonresidents for Alaska jobs is motivated by economic concerns (i.e., to employ more Alaskans), which does not violate § 1985(3) under *Scott*.

It is doubtful that discriminating against non-residents for public employment would violate the Privileges and Immunities Clause.[10] The Supreme Court does hold that the "pursuit of a common calling" is a fundamental privilege under the Clause. *Camden*, 465 U.S. 208, 219 (1984) (citing *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 387 (1978)). However, that privilege appears limited to private employment. The Ninth Circuit implies that the law is unsettled as to whether or not public employment is a fundamental privilege under the Clause. *International Org. of Masters, Mates & Pilots v. Andrews*, 831 F.2d 843, 856 (9th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988) (citing *Camden*, 465 U.S. at 219-20). However, the Supreme Court has clearly stated that the test for constitutionality is whether the discrimination by the state or city would in any way bias the employment decisions of private

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[10] "Application of the Privileges and Immunities Clause to a particular instance of discrimination against out-of-state residents entails a two-step inquiry." *United Bldg. and Constr. Trades Council v. City of Camden*, 465 U.S. 208, 218 (1984). First, the court must decide whether the discrimination burdens a privilege or immunity protected by the Clause. If so, then the second inquiry is to determine whether there are substantial reasons for the discrimination and whether the degree of discrimination bears a close relation to such reasons. *Id.* at 218, 222.

employers (such as contractors or subcontractors) against out-of-state residents. *Camden*, 465 U.S. at 221. In *Hicklin* and in *Camden*, the discrimination affected private contractors working on public projects. In the present case, the discrimination against nonresidents applying for employment with the Alaska Court System would not have any direct or indirect effect on private employers within the state.[11]

As far as potentially violating the right to travel, protected by the Equal Protection Clause, it is well-settled that while a state cannot condition public benefits or political rights on a term of residency, states may condition nonessential benefits and rights on a term of residency. *See Andrews*, 831 F.2d at 846 (citing Supreme Court cases). There is no fundamental right to government employment for

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[11] In an analogous context, the state, as an employer, is acting as a market participant. In dormant Commerce Clause cases, the Ninth Circuit has afforded states broader power to affect private employment and to discriminate against out-of-state entities when states act as market participants rather than as market regulators. *See, e.g., Associated Builders and Contractors, Inc. v. City of Seward*, 966 F.2d 492 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1577 (1993); *Big Country Foods, Inc. v. Board of Educ. of the Anchorage Sch. Dist.*, 952 F.2d 1173 (9th Cir. 1992).

purposes of the Equal Protection Clause. *Camden*, 465 U.S. at 219. Thus, a state may condition applications for public employment on a bona fide residency requirement. *See McCarthy v. Philadelphia Civil Service Comm'n*, 424 U.S. 645, 646-47 (1976) (*per curiam*) (upholding requirement of municipal residency for municipal employees). Furthermore, favoring resident applications is "rationally related" to the goal of attracting Alaskans to work for the state's court system. *See Andrews*, 831 F.2d at 847 (upholding Alaska statute that provided for cost of living wage differentials between state marine highway system's resident and nonresident employees).

Thus, under the law as it stood in 1992, it was not clearly established that conspiring against nonresident applicants for public employment would violate § 1985(3), the Privileges and Immunities Clause, or the Equal Protection Clause. Consequently, it appears that qualified immunity precludes Voigt's claims relating to discrimination against nonresidents and the infringement of a nonresident's right to travel.

b. *standing to assert unlawful discrimination*

Even if the Court were to determine that the law clearly protects nonresidents under § 1985(3), Voigt, a resident of Alaska, lacks standing to assert his discrimination claims. The Court has already noted Voigt's potential

lack of standing in its Order at Docket No. 89, citing *Briley v. California*, 564 F.2d 849, 858-59 (9th Cir. 1977), and *Canlis*, 641 F.2d at 718-21.

Voigt argues that *Briley* does not stand for the proposition that a plaintiff must be a member of a class discriminated against to assert claims under § 1985(3). Docket No. 101, pp. 59-65. Rather, he argues that the statute itself states that defendants may not discriminate against "any person or class of persons." 42 U.S.C. § 1985(3) (underlining added). Voigt contends that the statute and *Briley* articulate an "either/or" situation. Voigt further contends that both the Court and the Ninth Circuit in *Canlis* misinterpreted the statute and *Briley*.[12] He cites to a number of decisions from other circuits allowing non-members of the class to assert § 1985(3) claims on behalf of the class.

Those decisions, however, preceded *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989). In *Caplin & Drysdale*, the law firm

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[12] Note that the Ninth Circuit in *Canlis* stated as follows: "The law in this circuit is clear: the plaintiff must be a member of the class discriminated against to claim the benefits of § 1985(3)." *Canlis*, 641 F.2d at 721. This Court cannot ignore decisions of the Ninth Circuit regardless of its opinions concerning the Court of Appeals' reasoning.

representing a criminal defendant charged with engaging in a continuing criminal enterprise challenged the forfeiture of defendant's assets used to retain the law firm, arguing that the forfeiture statute infringed on the criminal defendant's Sixth Amendment right to counsel of choice and violated the Due Process Clause of the Fifth Amendment. On the standing issue, the Court stated the following test:

> When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury in fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations which we have identified in our prior cases point to permitting the litigant to advance the claim? . . .
>
> The second inquiry-- the prudential one-- is more difficult. To answer this question, our cases have looked at three factors: the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests.

Id., 491 U.S. at 623 n.3 (1989). The *Caplin & Drysdale* test was applied by the Supreme Court recently in a right-to-travel case, *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992). In *Nordlinger*, a California homeowner

and resident challenged the state's exemptions for transfers of property by owners over 55 and for transfers between parents and children from tax reassessments, alleging that the exemptions violated the right-to-travel because they made classifications directly on the basis of California residency. The Court found that the petitioner did not have standing to assert the constitutional claim because she did not identify any obstacle preventing nonresidents from asserting claims on their own behalf and did not show any special relationship with nonresidents whose rights she wished to assert. *Id.* at 2332 (citing *Caplin & Drysdale*, 491 U.S. at 623 n.3).

In this case, Voigt is not arguing that his own right-to-travel as a nonresident is restricted;[13] rather, he argues that because the state restricts others' rights to travel by discriminating against nonresident applications, the state denies Voigt employment unless he agrees to discriminate against nonresidents, too. Therefore, he would argue, if non- residents are deserving of protection under § 1985(3), Voigt should be able to assert a claim under § 1985(3) because his injury is associated with the nonresidents' plight. This assertion may show an injury that could satisfy the first prong of the

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[13] Indeed, it is instructive that Voigt was a "non-resident" at the time he was hired as Clerk of Court for Fairbanks.

Caplin & Drysdale test. However, Voigt cannot assert others' rights-to-travel because Voigt's situation does not satisfy the second inquiry under *Caplin & Drysdale*. *See Nordlinger*, 112 S. Ct. at 2332. In light of *Caplin & Drysdale*, Voigt lacks standing to assert the § 1985(3) claim.

2. *Lack of "Conspiracy" Precludes Claim*

a. *intra-corporate conspiracy doctrine*

Defendants contend that Voigt's conspiracy claim under § 1985(3) is barred by the "intra-corporate conspiracy doctrine," which holds that managers of a corporation jointly pursuing its lawful business do not become "conspirators" under § 1985(3) when acts within the scope of their employment are said to be discriminatory or retaliatory. Defendants cite *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 60 (1991).

In *Travis*, the plaintiff sued three senior executives of a mental health center under § 1985(2) after she was fired following her testimony on behalf of an employee that was suing the Center for vacation, sick, and holiday pay. It was unclear from the facts whether the Center was a private or public employer. The court cited an earlier Seventh Circuit decision, *Dombrowski v. Dowling*, 459

F.2d 190, 196 (7th Cir. 1972) (Stevens, J.), which held that a discriminatory business decision by two or more executives of the same firm did not constitute a conspiracy within the meaning of § 1985(2). In reexamining the issue, the *Travis* court noted two rhetorical questions that framed the dispute:

> (1) Why should action by a single employer be covered by § 1985 just because discussions among the firm's multiple agents precede decision? (2) Why should decisions taken by a plurality of actors be immune from check under § 1985 just because they take the trouble to incorporate?

Id. at 109. The *Travis* court then looked to the function of a § 1985 and determined that "Congress was concerned not about unilateral action but about organized, almost society-wide resistance to emancipation and civil rights." *Id.* at 110. Consequently, the court supported the *Dombrowski* decision.

The Seventh Circuit recently reaffirmed the *Travis* decision in *Hartman v. Board of Trustees of Community College Dist. No. 508, Cook County, Illinois*, 4 F.3d 465 (7th Cir. 1993). In *Hartman*, the plaintiff sued the Board of Trustees of a public institution under § 1985(3) after certain trustees directed her not to send a special student recruitment program into Latino communities. In dismissing the § 1985(3) claim under the

intra-corporate conspiracy doctrine, the court noted that the doctrine would not apply if the defendants are shown to have been motivated solely by personal bias. If the interests of the corporation played no part in the collective action, then the action was not taken within the scope of employment. *Id.* at 470. Also, the doctrine may not apply if it is shown that the conspiracy was part of some broader, extensive discriminatory pattern that permeated the ranks of the public institution's employees. *Id.* at 470-71.

While the intracorporate conspiracy doctrine may be well-established in other circuits, the Ninth Circuit Court of Appeals has not squarely addressed whether it applies in § 1985 cases. *See Portman v. County of Santa Clara*, 995 F.2d 898, 910 (9th Cir. 1993) (noting the massive split on the issue in other circuits, but refusing to decide the issue without briefing by the parties); *Padway v. Palches*, 665 F.2d 965, 969 (9th Cir. 1982) (expressly reserving the issue). Two district courts in the Ninth Circuit, however, have squarely addressed the issue and have concluded that the doctrine should not apply to conspiracies within a single governmental entity. *See, e.g., Diem v. City and County of San Francisco*, 686 F. Supp. 806, 810 (N.D. Cal. 1988); *Rebel Van Lines v. City of Compton*, 663 F. Supp. 786, 790-93 (C.D. Cal. 1987).

The district court in *Rebel Van Lines* noted that the Ninth Circuit had decided several cases involving § 1985 allegations against executives of a single corporation and had never dismissed the claims on the ground that they did not state a conspiracy. Consequently, the court felt the Seventh Circuit's *Dombrowski* decision "is of doubtful vitality in this circuit." *Id.* at 791. The district court opined that "there is no reason to believe that discrimination by an individual business is less harmful than discrimination by multiple businesses, or that discrimination by a single business deserves to be protected because it confers any benefit on society [citation omitted]. Conspirators should not be able to avoid the civil rights laws merely by incorporating before they commit their discriminatory acts." *Id.* at 792. The district court went on to hold that even if *Dombrowski* was good law as applied to private business, the doctrine could not apply to conspiracies within governmental entities, for to do so would immunize official policies of discrimination, contravening the law as it now exists.[14]

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[14] The court cited *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-91 (1978), which held that a municipality could be liable under § 1983 if the injury was the result of a custom or policy of the municipality. The court reasoned that if the intracorporate conspiracy doctrine applied to conspiracies

The *Rebel Van Lines* opinion appears well-reasoned. Even if the Ninth Circuit has not ruled specifically on the issue, it appears that it has impliedly refused to apply the doctrine to conspiracies within a governmental entity. *See, e.g., Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). In *Usher*, the plaintiff, a minority employee of the Los Angeles Police Department, was arrested when police responded to a complaint that he had broken a window in his apartment. He was taken to the police station where he remained handcuffed for two hours, was denied toilet access, was physically abused by the police officers without justification, and was subjected to racial slurs. The Ninth Circuit held that Usher "has adequately pleaded causes of action under 42 U.S.C. § 1985(2) and (3)" and reversed the district court's dismissal of Usher's claims. The court did not mention the intracorporate conspiracy doctrine.

In light of the district court opinions in the Ninth Circuit and the Ninth Circuit's refusal to dismiss the § 1985 claims in *Usher*, this Court will not dismiss Voigt's § 1985(3) claim solely on the basis of the intra-corporate conspiracy doctrine.

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within governmental entities, why restrict it to conspiracies alleged under § 1985 and not under § 1983 as well? *Rebel Van Lines*, 663 F. Supp. at 793 n.14.

b. absence of facts revealing a conspiracy

While Voigt's § 1985(3) claim may not be dismissed under the intracorporate conspiracy doctrine, it may be dismissed for failure to offer a preponderance of evidence revealing the existence of a conspiracy.[15] As noted above, one of the elements that the plaintiff must show in establishing the defendants' violation of § 1985(3) is the existence of a conspiracy. *Scott*, 463 U.S. at 828. Generally, a civil conspiracy is a combination or agreement of two or more persons to accomplish some unlawful purpose or to accomplish some lawful purpose through unlawful means. In a § 1985(3) action, the conscious objective of the agreement must be to accomplish the second element: "depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *Id.*; *See Bray*, 113

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[15] As the Supreme Court clarified in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at trial on the merits." *Id.* at 252. In Voigt's case then, the Court must determine whether reasonable jurors could find by a preponderance of the evidence that Voigt is entitled to a verdict.

S. Ct. at 762-63 (conscious objective of conspiracy must be impairment of constitutionally-protected right).

To show that each defendant participated in such a conspiracy, the plaintiff must demonstrate that each defendant tacitly agreed to share the common objective of the conspiracy; however, the plaintiff does not need to show that each defendant knew the exact details of the plan. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir.), *cert. denied*, 493 U.S. 809 (1989); *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983). When the plaintiff has the burden of proof on an issue, the defendant may move for summary judgment simply by pointing to the absence of facts to support plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). To avoid summary judgment, the nonmoving plaintiff must submit evidence of sufficient quantity and quality to support a jury verdict in plaintiff's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The court may draw an inference as to material fact in favor of the nonmoving plaintiff if the inference is rational or reasonable. *Phelps Dodge*, 865 F.2d at 1542 (citing *T.W. Elec. Serv. v. Pacific Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987)).[16]

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[16] In *Phelps Dodge*, the plaintiff alleged that Phelps Dodge, a corporation that owned and operated a large copper mine and milling

In this case, Voigt has not presented evidence from which a reasonable jury could infer that each of the Defendants tacitly agreed to retaliate against Voigt for his refusal to discriminate against nonresident applicants. The facts presented are largely undisputed, since Voigt relies heavily on transcripts of recorded interviews supplied by the Defendants, intraoffice memoranda, and public decisions and letters. *See* Part II-A above (Relevant Facts). From the facts, there is insufficient evidence to show each

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plant in Ajo, Arizona, conspired with local law enforcement officials to deprive its striking employees of their constitutional rights under § 1983. The plaintiffs had submitted evidence that Phelps Dodge enjoyed a powerful position in the community and had repeated contacts with the police; that the Justice of the Peace issued warrants without probable cause, following a meeting with the attorney's for Phelps Dodge; that the police allowed Phelps Dodge officials to view the list of employees that the police intended to arrest; and that the police provided deferential treatment to stikebreakers over strikers. The Ninth Circuit concluded that while none of the evidence on its own would support a justifiable inference of Phelps Dodge's participation in a conspiracy, such an inference could be drawn from all of the direct and circumstantial evidence taken together. Thus, summary judgment for the defendants was inappropriate.

Defendant participated in a retaliatory conspiracy.

Defendant Savell: Voigt contends that Judge Savell discriminated against nonresident applicants by deciding Demoski's grievance was valid. Voigt argues that Judge Savell violated the Personnel Rules because the Rules do not permit deference to an in-house applicant unless the applicant seeks a promotion. *See* Voigt's Affidavit, Docket No. 101, Ex. H, p. 13; Personnel Rule 3.13.02, Docket No. 101, Ex. K, p. 26. While Judge Savell did mention Rule 3.13.02 on p. 6 of his decision, the decision focused on Voigt's failure to properly evaluate the applicants' qualifications for the Records Clerk position. Judge Savell's decision suggests that Demoski was better qualified than Crawford/Perron. Docket No. 101, Ex. E-5. If Demoski was more qualified, Judge Savell's decision does not imply a conspiracy.

Voigt also relies on Jackson's statement in her telephonic interview with Shirley Nash regarding Judge Savell's interest in helping disgruntled employees (Docket No. 101, Ex. O-22, p. 24), Judge Savell's memorandum to court employees inviting comments on a new filing system (Docket No. 101, Ex. N-1.5), and the letter of intent to dismiss, which mentions Voigt's criticism of Judge Savell's grievance decision (Docket No. 101, Ex. Q-1), to show that Judge Savell had conspired with

the other Defendants to improperly discharge Voigt. This evidence does not give rise to an inference that Judge Savell agreed with others to discriminate against nonresidents and to discharge Voigt for refusing to join in such discrimination.

Defendant Jackson: Voigt appears to rely on Jackson's statements during recorded interviews with employees, especially Woods, to show that she was a member of the retaliatory conspiracy. Yet during the same interview, she clearly denies following any "local hire" policy.[17] Her statements to Woods reveal that she exerted pressure on Woods to more closely supervise the hiring decisions of Voigt, but no inference can be made from such statements that she supported an unlawful discrimination policy or supported firing Voigt because he did not follow an "Alaska-hire" policy.

Voigt contends that Jackson selectively

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[17] During the interview, Woods stated that he was not aware of an "edict or mandate" that precluded hiring out-of-state applicants. Jackson replied, "I guess I'm the last person-- I'm not one of those people that preach Alaska hire." She explained that there was no such mandate, but cautioned that if Woods hired from outside the state, "you're going to be criticized, and you better be ready to justify it." Docket No. 101, Ex. O-4, pp. 43-44.

interviewed members of Voigt's staff, implying that she was on some sort of witch-hunt to gather evidence against Voigt. Docket No. 101, p. 44. Voigt cites Jackson's statement to Shirley Nash advising Nash that she and the other disgruntled employees should "kind of join forces." The record does not bear out Voigt's contentions.

In the course of her investigation, Jackson interviewed all employees who were involved in any way with the hiring process for the recent criminal and records clerk positions.[18] From her investigation, Jackson

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[18] Jackson interviewed the following employees regarding the hiring procedures: Burk Voigt (he interviewed all the applicants); Mary Jo Carr (the personnel clerk who screened applications), Docket No. 101, Ex. O-2; Mary Betts (criminal supervisor who interviewed applicants for the criminal position), Docket No. 101, Ex. O-3; Ron Woods (area court administrator who initially denied Demoski's grievance), Docket No. 101, Ex. O-4, O-9; Sharon Hotrum (deputy clerk who interviewed applicants for the criminal clerk position), Docket No. 101, Ex. O-6; Dana Hoffman/Evans (she received the criminal clerk position), Docket No. 101, Ex. O-5; Megan Crawford/Perron (she received the records clerk position), Docket No. 101, Ex. O-7; Kathy Jenkins (Voigt's secretary who amended Crawford/Perron's application so that she would qualify for the criminal clerk

concluded that Crawford/Perron had received an unfair advantage in resubmitting her application for the records clerk position; that Voigt made inappropriate statements to Demoski by telling her that he was basing his selection of the new criminal clerk on "outgoing personality," which was an improper criterion; and that Demoski had not received proper deference for the records clerk position because the selection criteria used by Voigt to exclude her (legal experience and education) were far beyond that required of an entry level clerk. *See* Jackson's response to interrogatories, Docket No. 101, Ex. J-20.

While Jackson was investigating in

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position), Docket No. 101, Ex. O-10; Jan Stroffolino (records supervisor who interviewed applicants for the records clerk position), Docket No. 101, Ex. O-11; Roberta Demoski (she was denied the records clerk position), Docket No. 101, Ex. O-19; Magistrate Jackson (supervisor of Demoski at the Galena court), Docket No. 101, Ex. O-20; Shirley Nash (accounting supervisor who interviewed applicants for the records clerk position), Docket No. 101, Ex. O-22; Brenda Pitka (one of the applicants for the criminal clerk position), Docket No. 101, Ex. O-15; and Carolyn Turner (former personnel technician who disqualified Crawford/Perron's initial application for the criminal clerk position and later qualified the amended application), Docket No. 101, Ex. O-23.

Fairbanks, several employees asked to speak with her individually regarding other problems in the Fairbanks court. Carol Knight, one of the applicants for the criminal clerk position, complained that Voigt made inappropriate statements, such as airing problems he had with certain supervisors to other employees and stating that he felt he needed to treat women like children. She also complained that Voigt maliciously tied up the computer system to prevent others from using it and to assert his control. Docket No. 101, Ex. O-8. Susan Thorgaard, a clerk in the Transcript Department, complained of the low morale in the office, her perception that Voigt was dishonest,[19] and that she had worked an extra 500 hours of unpaid overtime helping Voigt set up the computer system. Docket No. 101, Ex. O-14. Melanie Corkhill, a civil clerk, also complained that morale was extremely low, that Voigt referred to his clerks as "dumb clerks," that Voigt talked to her about other employees' mistakes, and that Voigt abused the chain-of-command by demanding that communications from employees flow through their supervisors but refusing himself to communi-

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[19] She explained that one day, workers in the building broke an employee's coffee mug and left three dollars for a replacement. Voigt pocketed the cash and the employee bought her replacement mug without reimbursement. Docket No. 101, Ex. O-14, pp. 9-10.

cate to employees through the supervisors. Docket No. 101, Ex. O-16. Finally, Wendy Clayton, a former secretary for Voigt, complained of Voigt's general hostility. Docket No. 101, Ex. O-24. These employees apparently sought out Jackson while she was investigating alleged improprieties in hiring procedures; there is no implication that Jackson was attempting to find additional excuses to fire Voigt, although the intent to dismiss letter specifically mentions each of the complaints raised by these employees as a reason for his dismissal. *See* footnote 1, *supra*.

Jackson's statement to Shirley Nash suggesting that Shirley and others should "kind of join forces" is part of her statement to Shirley that "if you think you're being treated unfairly or you see other people being treated unfairly, you're going to have to kind of join forces." Docket No. 101, Ex. O-22, p. 22-23. Nash had just complained to Jackson that she felt Voigt unfairly manipulated his employees and refused to help them when he identified a performance problem. Jackson asked "why haven't you gone to the ACA if you think that things haven't been handled fairly?" Nash replied that she didn't think Woods would want to talk to her. *Id.* at 22. Consequently, Jackson made the statement cited by Voigt. Such statements, taken together, do not imply that Jackson was promoting any conspiracy to fire Voigt.

None of the evidence presented by Voigt permits an inference that Jackson participated in a conspiracy to discriminate against non-residents or to participate in a conspiracy to discharge Voigt unlawfully.

Defendant Woods: Voigt cites to Woods' interview with Jackson to show that he joined the retaliatory conspiracy. On March 4, 1992, after Jackson cautioned Woods that hiring out-of-state would create a ruckus, Woods stated that "the last thing I would have done is to allow a situation to happen that was going to blow up in Art's face . . . Burk . . . didn't realize the ramifications. I certainly didn't and-- but I do now." Docket No. 101, Ex. 0-4, p. 45. Woods further stated that "it did not register with me that we were operating in an environment that I've learned we're operating in." *Id.* at 46. Jackson then replied, "All I can say is that Sunny obviously thought that she had conveyed it very strongly to you. She says she called you and said that Cole was adamant about not selecting from outside of Alaska because that caused Legislatures [sic] to call and ask questions and complain." *Id.* at 47.

The next day, March 5, Jackson continued the interview with Woods, noting that some employees perceived that if they got on Voigt's bad side, they would be pressured to leave. Woods replied that "quite honestly and quite frankly, Karrold, I'm forming the

opinion that that may well be true, you know, that there are some problems with Burk." Docket No. 101, Ex. O-9, pp. 15-16. Jackson then warned Woods that he must get the court in order, stating "your destiny is tied to the morale of this court" (Docket No. 101, Ex. O-9, p. 22), and encouraged Woods to assert his control as ACA (*Id.* at 23). Woods then announced that "it's my opinion from my investigation thus far, that there was management judgment error problems. And there's reason for concern." *Id.* at 24.

Voigt essentially argues that the interview reveals that Woods succumbed to the pressures exerted by Jackson to join the conspiracy to discharge Voigt unlawfully and to discriminate against nonresidents. The record does not support this contention.

Defendants Snowden and Cole: Assuming Snowden and Cole are parties to the action, Defendants' counsel admits there may be a "scintilla" of evidence against Snowden and Cole that they were part of a conspiracy to discriminate against nonresidents. Docket No. 112, p. 27. The evidence cited by Voigt includes a statement by Sunny Ziots, an Acting Personnel Director during Jackson's periodic absence, which Jackson read to Woods during the interview with Woods. Ziot's statement noted that "Cole instructed me to call Woods and relay four points. I was to advise him . . . (3) that Cole is adamant about not

selecting from outside Alaska because that caused Legislators to call and ask questions and complain." Docket No. 101, Ex. O-4, p. 42.

However, as the Defendants point out, Ziots asserts in an affidavit that her statement was a misstatement of what Cole had actually instructed her to say. Ziots states that Cole had instructed Ziots to say, "selecting from the Lower 48 could be a big issue for legislators and others." *See* Ziots' affidavit, Docket No. 112, Ex. E. While this inconsistency may create a question of Ziots' credibility, it does not provide cognizable evidence regarding Cole. *See* Fed. R. Civ. P. 56(e). Ziots' explanation is, however, consistent with the position Cole took in a letter to Representative Phillips on August 23, 1989, following the controversial hiring of Voigt as Clerk of Court, an out-of-state applicant at the time. Cole states in her letter that "no future out-of-state recruitment" will occur except under exceptional circumstances, but that any out-of-state applications that come in on their own will be handled in the same manner as all others in the selection process; the court will choose the best qualified candidate from the pool of applicants. Docket No. 101, Ex. J-2. Cole's affidavit reaffirms this position. Docket No. 112, Ex. F, p. 4.

As to Snowden, the Administrative

Director who ordered the investigation into the unusual hiring procedures in Fairbanks, Voigt contends that Snowden acknowledged an Alaska-hire policy, but refused to put the policy in writing because it would be illegal. The contention is supported by three affidavits from Judge Hodges, Crawford/Perron, and Voigt, which simply relate what Woods allegedly told each of them after meeting with Snowden. Docket No. 101, Ex. F, G and H. However, as the Defendants point out, the affidavits contain double hearsay that has been repudiated by Woods. Docket No. 112, p. 29-30. Woods and Snowden clearly deny that Snowden acknowledged any such policy. Docket No. 112, Ex. H and I. Rather, Snowden was concerned that a more qualified Alaskan minority was not selected over a minimally qualified nonresident. *Id.* Furthermore, Woods denies ever speaking to Crawford/Perron regarding his conversation with Snowden. Docket No. 112, Ex. H, p. 5. While these inconsistencies may reflect on the credibility of Woods, they do not implicate Snowden in any conspiracy.

Consequently, Voigt has not produced the "quantum and quality" of evidence sufficient for a jury to find that Snowden and Cole participated in a retaliatory conspiracy to discharge Voigt.

C. Conclusion

The Court tentatively grants Defendants' motion for partial summary judgment as to Voigt's cause of action under 42 U.S.C. § 1985(3). In the first place, Voigt has failed to satisfy the first element of a § 1985(3) claim; the facts presented to not appear to support a reasonable inference that each of the Defendants participated in a retaliatory conspiracy. Second, even if Voigt has offered sufficient evidence to raise the inference, Voigt has failed to satisfy the second element of a § 1985(3) claim; the facts do not support a reasonable inference that the purpose of the conspiracy was to invidiously discriminate against a protected class of persons. In fact, Voigt, Cramer and Mills were all out-of-state residents at the time they were "hired" for employment with the court system. In any event, it appears that the claim is precluded by the doctrine of qualified immunity, since the law was not so clearly established that a reasonable official should have realized that conspiring to discharge Voigt for refusing to discriminate against nonresidents applying for public employment would violate 42 U.S.C. § 1985(3).

III. WAS THE LAW SO CLEARLY ESTABLISHED THAT A REASONABLE OFFICIAL SHOULD HAVE REALIZED THAT DISCHARGING VOIGT FOR HIS CRITICISM OF THE CRAMER HIRING AND THE DEMOSKI GRIEVANCE DECISION WOULD VIOLATE 42 U.S.C. § 1983?

A. *Relevant Facts*

In December 1990, a report was prepared by Dale Sipes, a court management consultant, entitled "Fairbanks Judgeship Needs Study." Docket No. 101, Ex. C. The Sipes report was highly critical of the working environment at the Fairbanks courthouse. *Id.* at p. 23-24.[20] Voigt appears to have been quite defensive following the report, perceiving that Judge Savell blamed him for the critical report. *See* Voigt's memorandum to Savell of January 17, 1991, at Docket No. 112, Ex. B, last page.

A vacancy occurred in the Fairbanks Area Court Administrator position in early 1991, and four individuals were interviewed for the position in mid-April 1991. *See* Voigt's

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[20] The report made such statements as "the working environment of the entire courthouse is not reported to be one of mature collegiality," and "sending memoranda that are biting or downright nasty instead of walking down the hall to discuss an issue has become an acceptable practice. This does not appear to be an environment where new ideas can be put forth in a spirit of goodwill and mutual support." Id. at p. 23.

deposition, Docket No. 87, Ex. A, p. 66. One of the candidates was Judith Cramer, an administrator in Ohio. Voigt was highly critical of Cramer. In a supervisors' meeting sometime in April, Voigt indicated that Cramer had received preferential treatment because she was an administrative favorite who knew Snowden well and because she was the only candidate to have lunch with Chief Justice Rabinowitz. *See* Voigt deposition, Docket No. 87, Ex. A, pp. 22, 35. Voigt also expressed concern that Cramer would adopt Snowden's policies rather than serve as an advocate for the Fourth Judicial District. *Id.* at 28-29; *see* Affidavit of Brenda Richards [sic] (jury clerk), Docket No. 101, Ex. A-19. Finally, he also stated that the judges in Ohio would not be sorry to see her go. Docket No. 87, Ex A, pp. 29-30. Voigt also stated to Judge Savell that he thought Judge Savell should consider Cramer's gender if that might exacerbate the court system's existing male and female cliques. *Id.* at 56-58, 82-83.

Judge Savell initially offered the position to Cramer, but she declined the position. On Friday afternoon of April 26, Savell offered the position to Donald Mills, an administrator in Oregon, and Mills accepted the position. *See* Savell's affidavit at Docket No. 87, Ex. C. On Monday, April 29, Cramer called to indicate that she had changed her mind and would like to accept the position. *Id.* That afternoon, Judge Savell and

Judge Steinkruger telephonically contacted the other judges who were within the district to get their approval to fire Mills and hire Cramer. *Id.* Apparently, six judges voted to hire Cramer and Judge Hodges opposed. *See* Hodges' memorandum of May 20, 1991, Docket No. 101, Ex. A-16. Judge Savell then called Snowden, who approved the action and authorized an offer to make Mills whole for any losses or expenses he had occurred [sic]. Docket No. 87, Ex. C. Judge Savell then called Mills in the late afternoon of April 29 and "fired" him; he then hired Cramer. *Id.* Apparently, when Savell called Mills, Mills indicated that he had met with a realtor to consider listing his house for sale, and that neither he nor his wife had terminated their current employment. *Id.* However, Judge Hodges contends that when he called Mills the next day, April 30, Mills indicated that his wife had resigned her job and an initial garage sale had taken place. *See* Hodges memorandum dated April 30, 1991, Docket No. 101, Ex. A-6.

Judge Steinkruger circulated a memorandum to all court system employees on April 30, informing them of the hiring change. Docket No. 101, Ex. A-7. The following day, there was a supervisors' meeting attended by the various departmental heads of the Fairbanks Court System. *See* Voigt deposition, Docket No. 87, Ex. A, p. 7-10. At the meeting, Voigt agreed with an attendee's characterization

that Judge Savell acted "disgracefully." *Id.* at 18. He stated that Judge Savell lacked honor and integrity in his handling of the Cramer incident. *Id.* at 15. He also does not deny that he told the supervisors that Judge Savell acted without authority in violation of Personnel Rules. *Id.* at 45-46.

After the meeting on May 1, Voigt met Anna Farneski, a news reporter for the Fairbanks Daily News-Miner, in the courthouse parking lot. *Id.* at 103-104. She inquired about the ACA situation, and Voigt responded that he could give her a copy of Judge Steinkruger's memorandum. *Id.* at 104-105. When Voigt made a copy of the memorandum, he discovered a copy of Judge Hodges' memorandum to Judge Savell on top of a printer in the clerk's office. *Id.* at 105. Judge Hodges' memorandum was highly critical of Judge Savell's handling of the Cramer incident. Docket No. 101, Ex. A-6. Voigt placed both memoranda in an envelope and sent them to Farneski. Docket No. 87, Ex. A, p. 106. On May 5, 1991, the Fairbanks Daily News-Miner published a story on the Cramer/Mills fiasco. Docket No. 101, Ex. A-9. The story published Judge Hodges' statement that the matter "reflects adversely on the credibility and integrity of the Alaska Court System and the 4th Judicial District." Docket No. 101, Ex. A-6; Docket No. 101, Ex. A-9.

On May 8, Judge Savell denied Voigt's

request that he receive a salary adjustment for service as acting ACA. Docket No. 101, Ex. A-10.[21] Voigt responded on May 8 that he intended to "refrain from any involvement outside the scope of the Clerk's Office." Docket No. 101, Ex. A-12. Judge Savell then clarified that he expected Voigt to meet his responsibilities as assistant ACA, which is part of his job description. Docket No. 101, Ex. A-13. On May 15, Voigt noted his intention to file an informal grievance, stating that Savell's denial of Voigt's request was "unfair and capricious." Docket No. 101, Ex. A-14. Consequently, Judge Savell issued a formal written reprimand to Voigt on May 15. Docket No. 101, Ex. A-15.

In his reprimand, Judge Savell explained the reasons for his dissatisfaction with Voigt's performance. He regarded Voigt's behavior as uncooperative and "befitting a spoiled, pouting child." He noted Voigt's failure to attend a regularly scheduled meeting because he was no longer the acting ACA and Voigt's resistance to performing

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[21] Judge Savell's memorandum to Voigt stated, "Effective immediately, you are no longer to perform the duties or exercise the responsibilities of acting area court administrator. I have found your performance in this capacity unsatisfactory and I do not recommend, and in fact, oppose a salary adjustment."

duties expected of an assistant ACA, requiring the recent exchange of clarifying memoranda. Savell also explained that Voigt's attitude was having a harmful effect on relations with court system representatives. He complained of Voigt's "insolent and sarcastic comments" during a work session and Voigt's war-like "us and them" attitude toward the Anchorage Court System. Savell was upset with Voigt's actions that "appear to have been designed to torpedo my selection of Judith Cramer and to undermine any chance she has of being accepted in the building and succeeding at her job." He noted Voigt's apparent gender bias[22] and his comments regarding preferential treatment and allegiance to the Anchorage administrators, as well as other negative comments. Finally, Savell noted Voigt's resistive behavior toward Savell's request for case management reports.

Although Voigt disagreed with the reprimand, he chose not to file a grievance; instead, he apologized to Judge Savell and the two shook hands and agreed to move forward. Docket No. 87, Ex. A, p. 91. For no apparent reason, Judge Savell mailed a copy of the reprimand along with a copy of the newspaper article to his former law clerk, Crawford/Perron. *See* Crawford/Perron affidavit, Docket No. 101, Ex. F.

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[22] *See* Excerpt from Voigt's deposition, Docket No. 101, Ex. A-20.

Later that summer, Voigt was criticized for transferring a records clerk to the civil department and a civil clerk to records. Karrold Jackson investigated the incident and in a memorandum dated August 8, 1991, she criticized Voigt's "poor managerial judgment," noting that he had discussed a supervisor's poor performance with one of the supervisor's employees and that he had undermined the authority of subordinate supervisors. Docket No. 101, Ex. B-1, p. 5-6. Jackson concluded as follows:

> If this were the first time Burk had been in violation of the personnel rules or shown poor managerial judgment, I believe a stern verbal warning would be in order. However, this is not the first time for either [citation to certain attachments]. If Burk persists in violating the personnel rules and/or taking inappropriate actions as a manager, he is placing the court in jeopardy of adverse legal action.

Id. at 6.

In October 1991, Voigt received his six-month evaluation from Judge Savell. Docket No. 101, Ex. B-6. Savell rated Voigt "above average" overall, but noted several categories where Voigt needed improvement: "following policies and procedures," "getting along with other workers," and "supervising others." In his comments, Savell explained as follows:

> If he cannot accomplish what he wants directly, through proper procedures, he will at times ignore the procedures to obtain his goal through less direct means. Examples abound, whether in his dealings with the financial arm of administration to procure equipment or funds, adding extra duties to the scope of work of contractors, undermining the appointment of an Area Court Administrator whose selection he did not favor, or coercing a "voluntary" personnel action. His great accomplishments in the Clerk's Office have come at the price of dampened morale and fear on the part of subordinate employees. He has been uncooperative and has harmed our relations with the Department of Transportation, which maintains our facility.

Id. at 3 (emphasis added). Savell further complained that Voigt was "openly hostile and disrespectful" toward court administrators and that "I, and others, perceive that he often has a hidden or 'secret agenda' that is being advanced." *Id.* at 3.

The Demoski grievance erupted in February 1992. See "Relevant Facts" at Part II-A. Voigt was again highly critical of Judge Savell, following his grievance decision. Apparently, Voigt discussed the grievance decision with at least five other court employees, including Shirley Nash, Sharon Hotrum, Jan Stroffolino, Robin Nicholson and Ron Woods. *See* Voigt deposition, Docket No.

87, Ex. A, pp. 670-672. Voigt speculated that Savell discriminated against nonresidents, and voiced this criticism to Shirley Nash. *Id.* at 561. He also admits that he may have told her that he felt Savell had violated the personnel rules and that Savell was motivated by personal dislike for Voigt. *Id.* at 562-65. Voigt admits that he felt Savell was out to "get him" ever since his criticism of the Cramer incident. *Id.* at 674. Voigt also commented to Nash that he thought it would be hard for a person to grieve something and expect to end up working in that environment, and he disagreed with Savell's remedy of hiring Demoski for the next available position. *Id.* at 687-88.

Once Crawford/Perron started to work as the new records clerk, Judge Savell informed her that she would have to "choose sides," implying that she would have to choose between her friendship with Judge Savell and any positive relationship with Voigt. *See* Crawford/Perron affidavit, Docket No. 101, Ex. F, p. 6. Sometime after Voigt was discharged, Judge Savell told her that she no longer needed to choose sides. *Id.* at 7. Voigt was discharged March 26, 1992. The reasons for his discharge were articulated in the letter of intent to dismiss, which included his inappropriate statements regarding the Cramer incident and his negative statements regarding the Demoski grievance decision. *See* footnote 1, *supra*.

B. *Voigt's § 1983 Claims*

Section 1983 prohibits the deprivation of constitutional rights by any person acting under color of state law. Voigt claims that his discharge was in retaliation for Voigt's criticism of the Cramer and Demoski incidents, essentially depriving him of his constitutional right to freedom of speech. He claims that the Defendants together violated § 1983 by conspiring to discharge Voigt for his criticisms of the Cramer and Demoski incidents.[23] He also claims that each Defendant violated § 1983 by retaliating against Voigt for his criticisms of the Cramer and Demoski incidents.[24]

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[23] Voigt merges this conspiracy claim with his conspiracy claim under § 1985(3). As noted already, there is no evidence of a conspiracy under § 1985(3).

[24] There is no evidence that Snowden, Cole or Jackson retaliated against Voigt because of his criticism of the Cramer incident or the Demoski incident. They merely participated in the investigation of alleged improper hiring practices. In fact, it appears that Snowden ordered the investigation before Voigt ever made his critical remarks regarding the Demoski grievance decision. The letter of intent to dismiss Voigt, prepared by Judge Savell and signed by both Savell and Woods, alludes to Voigt's criticisms of both incidents. However, the preponderance of the

The Ninth Circuit has adopted a three-step test for determining whether the retaliatory discharge of a public employee violates the Free Speech Clause of the First Amendment. *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir.), *cert. denied*, 113 S. Ct. 815 (1992); *Gillette v. Delmore*, 886 F.2d 1194, 1197 (9th Cir. 1989). First, the court must determine whether the plaintiff's speech at issue was entitled to constitutional protection. Second, the court must determine whether the protected speech was a substantial or motivating factor behind the discharge. Third, the court must determine whether the discharge would have occurred even if the employee had not engaged in the protected speech.

C. *Was Voigt's Speech Constitutionally Protected?*

Determining whether an employee's speech is constitutionally protected is a question of law for the court to decide. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). The issue involves a balancing "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public ser-

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evidence shows that while Voigt's criticism may have been a factor in their decision to terminate Voigt, it was not necessarily the motivating factor.

vices it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). To be protected then, the employee first must show that his speech involved a matter of public concern. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Gillette*, 886 F.2d at 1197. If the speech involves a matter of public concern, then the burden of proof shifts to the government to show that the employee's speech "so severely damaged office harmony and working relationships that the government's interest in promoting an effective workplace outweighed the employee's First Amendment rights." *Hyland v. Wonder*, 972 F.2d 1129, 1139 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2337 (1993), *on remand*, 1993 WL 356891 (N.D. Cal. 1993). *See Rankin*, 483 U.S. at 388 ("The State bears a burden of justifying the discharge on legitimate grounds"); *Connick*, 461 U.S. at 150 (burden on State varies depending upon nature of employee's expression).

1. *Matter of Public Concern*

Protection may be triggered if any part of the employee's speech addresses an issue of public concern, even though other parts of the expression do not qualify. *Hyland*, 972 F.2d at 1137. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148.

a. *content*

Speech of public concern addresses "issues about which information is needed or appropriate to enable members of society to make informed decisions about the operation of their government." *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983). On the other hand, speech that "deals with individual personnel disputes and grievances," which is of no relevance to the public's evaluation of the performance of governmental agencies, is not of public concern. *Id.* at 1114. Some speech addresses issues that are inherently of interest to the public, such as allegations of racial discrimination. *Connick*, 461 U.S. at 148 n.8; *see Roth v. Veteran's Admin.*, 856 F.2d 1401, 1406 (9th Cir. 1988) (characterizing allegations that the VA "wasted resources, acted unethically, mismanaged personnel, and violated safety regulations" as inherently of interest to the public since such criticisms went directly to the institution's performance of its duties).

The Ninth Circuit recently summarized case law identifying specific issues of public concern in *Hyland*, 972 F.2d at 1137-38. These included: misuse of public funds, wastefulness, and inefficiency in managing and operating government entities (citing *Roth*, 856 F.2d at 1405); the competency of the Mediterranean Fruit Fly Eradication Project Management (citing *Allen v. Scribner*, 812 F.2d 426 (9th

Cir.), *amended*, 828 F.2d 1445 (9th Cir. 1987)); the competency of the police force, the interrelationship between city management and its employees, discipline and morale in the work place, and an agency's efficient performance of its duties (citing *McKinley*, 705 F.2d at 1114); and the low morale, inadequate training and discipline of fire-fighters (citing *Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 18 (2d Cir. 1979)). In *Hyland*, a volunteer working for the San Francisco Juvenile Probation Department drafted a memorandum to the presiding judge which "exposed abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetence of public law enforcement officials at Juvenile Hall." 972 F.2d at 1137. The Ninth Circuit found the content of the memorandum included issues of public concern.

b. *context*

It is not enough, however, that the speech concern governmental incompetence, etc., for it to necessarily rise to the level of public concern. The court must also examine the context of the speech, focusing on the point of the speech. *Roth*, 856 F.2d at 1405. In *Connick*, 461 U.S. at 148, the Court distinguished between speech that sought to bring to light actual or potential wrongdoing or breach of the public trust and speech that

merely reflected one employee's dissatisfaction with her employment. In *Connick*, the plaintiff was an assistant district attorney in New Orleans who strongly opposed her transfer from one section of the criminal department to the other. She prepared and circulated a questionnaire soliciting the views of her fellow staff members "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141. The Court specifically noted that "Myers did not seek to inform the public that the Dist ict Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." *Id.* at 148. Rather, the focus of Myers' questions was "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre." *Id.* at 148.

The Ninth Circuit has emphasized the distinction articulated in *Connick*. In *Roth*, the court found that the plaintiff's criticism of the management of the VA's San Francisco Medical Center was unlike the situation in

Connick because it involved no personal employment dispute; "[n]or were Roth's comments precipitated by adverse actions of his supervisors pertaining to his employment. In fact, it is undisputed that the defendants hired Roth specifically to act as a "trouble-shooter," and thereby charged him with making just these kinds of criticisms." 856 F.2d at 1406. Similarly, in *Hyland*, the court found that the plaintiff's criticisms of management at Juvenile Hall "was not the by-product of a personal employment dispute. The memorandum did not concern Hyland's dissatisfaction with his own position or on-the-job treatment [citation]. Hyland had no personal occupational stake in the dismissal of La Plante [the Director]. Hyland's memorandum addressed more than a 'work place grievance'- Hyland spoke 'in order to bring wrongdoing to light . . . [not] merely to further some purely private interest.'" 972 F.2d at 1138 (citations omitted).

Thus, the *Connick* distinction focuses upon whether the public employee speaks out as a citizen upon matters of public concern or simply speaks out as an employee upon matters of personal interest. 461 U.S. at 147. Consequently, it should be noted that statements made during the course of an employee's official duties weigh against a conclusion that they involve matters of public concern. *See, e.g., Koch v. City of Hutchinson*, 847 F.2d 1436, 1442-43 (10th Cir.), *cert. denied*,

488 U.S. 909 (1988) (fire inspector's routine report was not exempted from First Amendment protection *per se*, but fact that report was made in the course of the employee's official duties militated against a finding that the speech addressed matters of public concern); *Erickson v. Board of County Comm'rs*, 801 F. Supp. 414, 421 (D. Colo. 1992) (citing (*Considine v. Board of County Comm'rs*, 910 F.2d 695, 700 (10th Cir. 1990)) (county administrator advised board of commissioners during public meeting of potential budget law violations by certain board members; while noting that speech during course of official duties weighed against protection, the court ultimately found that it did concern matters of public concern).

c. *form*

A final factor in determining whether the employee's speech rises to a level of public concern is the form of the speech. It is not necessary that the employee's speech be broadcast to the general public for it to be considered a matter of public concern. In *Hyland*, the court rejected the defendant's contention that Hyland's limited disclosure of his memorandum to the judges and others charged with supervising the administration of Juvenile Hall precluded its contents from being of public concern; rather, the court noted that the Supreme Court permitted a public employee "to communicate privately with

his employer rather than to spread his views before the public." 972 F.2d at 1138-39 (quoting *Givhan v. Western Line Consol. Schl. Dist.*, 439 U.S. 410, 415-16 (1979); and citing *Rankin*, 483 U.S. at 386-87 n.11; *Connick*, 461 U.S. at 149). *See also*, *Gillette*, 886 F.2d at 1198 ("The fact that Gillette's speech was not directed to the public at large, to inform it of the perceived problems, is not critical to the inquiry of whether the speech involves a matter of public concern").

On the other hand, however, simply because a newspaper finds the speech newsworthy does not mean that the speech involves a matter of public concern for First Amendment purposes. In *Koch*, the plaintiff fire inspector suggested in his report that a fire had been caused by arson, ignoring a laboratory report that had concluded that the fire was caused by a cracked gas valve. The County Attorney asked two other inspectors and the local bureau of investigation to submit statements on the cause of the fire, and their reported contradicted Koch's. The local newspaper reported the dispute as to the cause of the fire. Following Koch's subsequent demotion, the newspaper published stories describing the entire situation. The Tenth Circuit, however, held that media publicity was not determinative of the question of whether Koch's speech was a matter of public concern. 847 F.2d at 1448 ("The factors which determine whether a story is newsworthy are hardly

coterminous with the factors which determine whether the communication has societal ramifications, and in any event, newspaper editors cannot decide the question for us") (quoting *Egger v. Phillips*, 710 F.2d 292, 317 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983)). *See also, Jurgensen v. Fairfax County*, VA, 745 F.2d 868, 888 (4th Cir. 1984) (employee of police department's Emergency Operations Center turned over an internal administrative review report to a reporter at the *Washington Post*, which criticized the EOC's four-day, 10 hour work shift and suggested an increase in staff and better training, and the subsequent newspaper story referred to the report; the court held that the report did not include material of any substantial public concern).

d. *Voigt's speech*

Voigt argues that his speech criticizing the Cramer incident and the Demoski incident is speech "that can fairly be considered as relating to any matter of political, social, or other concern to the community." *Gillette*, 886 F.2d at 1197. Voigt contends that his speech regarding the Cramer incident brought to light potential wrongdoing (i.e., preferential treatment and acting without authority under the personnel rules) which was of public concern as evidence by newspaper stories.

Arguably, the content of some of Voigt's

speech regarding the hiring of Judith Cramer was of limited public concern because it exposed perceived abuses within the court system. However, looking at the context of Voigt's speech, it is clear that he was not speaking as a citizen. Rather, Voigt was speaking as an employee disgruntled by the possibility that the Fourth Judicial District would be "under the thumb" of the Anchorage administration and run by a woman who could exacerbate gender-based "cliques" within the system. Furthermore, there is evidence that Voigt was feeling defensive following the Sipes Report. The fact that the newspaper printed a story on the Cramer hiring does not serve to raise Voigt's disgruntled responses to the level of public concern.[25]

Voigt argues that his speech regarding the Demoski grievance involved a matter of public concern because it concerned a perceived discrimination against nonresidents in violation of their constitutional rights. Again, however, it is questionable whether Voigt made the speech as a concerned citizen.

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[25] In fact, Voigt testified that when he sent Judge Hodges' memorandum to the newspaper, he did not specifically intend to inform the general *public* so much as to provide the other *employees* with a better explanation for the hiring of Cramer. *See* Voigt's deposition, Docket No. 87, Ex. A, pp. 109, 112.

This is because Voigt was under the impression that Judge Savell was "out to get him" ever since Voigt's criticism of the Cramer incident. Thus, Voigt's comments were the by-product of a personal employment dispute. The context factor further weighs against Voigt because his comments were made during the course of his official duties at the time (i.e., Fairbanks hiring decisions).

Even if Voigt could ultimately convince the Court that his speech involved matters of public concern, for purposes of qualified immunity, the Court finds that reasonable officials could have determined that Voigt's speech more closely resembled the situation in *Connick* rather than the situation in *Roth* and therefore conclude that Voigt's speech did not involve matters of public concern.

2. *Balance of Interests*

If the Court determines that any part of Voigt's speech involved a matter of public concern, then the next step in determining whether or not that speech is constitutionally protected is for the Court to balance the interests of Voigt against the interests of the Defendants. The burden is on the Defendants to show that Voigt's speech so severely damaged office harmony and working relationships that the government's interest in promoting an effective workplace outweighed Voigt's First Amendment rights. *See Hyland,*

972 F.2d at 1139. This burden to show disruption varies with the content of the speech-- "[t]he more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made." *Id.* at 1139. *See Connick*, 461 U.S. at 152 ("a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern"). "Actual, material and substantial" disruption must be demonstrated. *Hyland*, 972 F.2d at 1140.

Note that determining to what extent the plaintiff's speech disrupted office operations involves a factual inquiry that may preclude summary judgment in some cases. *See, e.g., id.* at 1140; *Gillette*, 886 F.2d at 1198; *Roth*, 856 F.2d at 1408.[26]

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[26] In *Hyland*, the Ninth Circuit remanded the case for a determination of the disruption issue. However, on remand, the district court granted the defendants' motion for summary judgment on grounds of qualified immunity and never determined whether there was disruption. Instead, the district court found that at the time the defendants acted it was not clearly established under the law that a volunteer employee was entitled to the same level of First Amendment protection as a city employee. 1993 WL 356891 (N.D. Cal. 1993).

It is questionable, however, whether the Ninth Circuit Court of Appeals would

automatically apply qualified immunity simply because the balancing inquiry is factually complex. In *Roth*, the defendants were asserting a qualified immunity defense and argued that since the court must balance the competing interests, the public officials could not be expected to predict the outcome of such balancing or engage in it themselves. They cited *Benson v. Allphin*, 786 F.2d 268 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986), which recognized that cases requiring such balancing may make it difficult to find the law "clearly established" when assessing claims of qualified immunity. The Ninth Circuit, however, refused to hold that "public employees can never maintain a *Bivens* action alleging retaliation for exercise of the [F]irst [A]mendment rights because adjudicating these claims requires particularized balancing." 856 F.2d at 1408. It distinguished *Benson* by noting that the Seventh Circuit considered the issue of qualified immunity after a full trial, having more thoroughly developed the facts for comparison to existing case law. In contrast, the Ninth Circuit Court of Appeals did not have sufficient facts on the claim of office disruption in the record before it. *Id.*

However, a district court in the Tenth Circuit has found qualified immunity applicable where balancing the interests involved a complex factual analysis. *See Erickson v. Board of County Comm'rs*, 801 F. Supp. 414, 423 (D. Colo. 1992). In *Erickson*,

a. *factors to consider*

The balancing element takes into consideration the "manner, time, and place of the employee's expression" as well as "the context in which the dispute arose." *Rankin*, 483 U.S. at 388; *Connick*, 461 U.S. at 152. The balancing involves a "factual inquiry into such matters as whether the speech (i) impairs dis-

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Judge Babcock stated as follows:

> . . . In some circumstances the fact-specific balance struck under *Pickering* may preclude a determination of "clearly established law," thereby giving rise to qualified immunity under *Harlow*, [citing *Patrick v. Miller*, 953 F.2d 1240, 1246 (10th Cir. 1992)]
>
> In this case the *Pickering* analysis is complex and the balance struck narrowly tips in favor of Erickson's right to free speech. This case presents the situation where the close *Pickering* balance precludes me from concluding that a free speech right was clearly established. Consequently, Hayden and Watson are entitled to qualified immunity on Erickson's federal and state claims for deprivation of his right to free speech.

cipline or control by superiors, (ii) disrupts coworker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operation of the office." *Hyland*, 972 F.2d at 1139 (citing *Rankin*, 483 U.S. at 388).

In considering these factors, it is significant that the employee's speech occurred at the office. *See Connick*, 461 U.S. at 153 ("the fact that Myers, unlike Pickering, exercised her rights to speech at the office supports Connick's fears that the functioning of his office was endangered"); *see also Koch*, 847 F.2d at 1450 (fact that speech occurs in the course of employee's official functions is an important factor); *Erickson v. Board of County Comm'rs*, 801 F. Supp. at 421 (same as *Connick* quote).

Also, under the factors, if "close relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. Finally, the Court should note that a high ranking public employee has an obligation to use caution in speaking publicly about matters that could affect the functioning of the agency. *See Rankin*, 483 U.S. at 390-91 ("The burden of caution employees bear with respect to words they speak will vary with the extent

of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public role, the danger to the agency's successful functioning from that employee's private speech is minimal"); *McKinley*, 705 F.2d at 1115 (a "high level public employee obligated to implement an administration's policies" may be dismissed "if the employee refused to support those policies and sought to undermine them publicly"); *Koch*, 847 F.2d at 1449-50 (employee's responsibilities within workplace are relevant); *Erickson v. Board of County Comm'rs*, 801 F. Supp. at 422 ("a governmental employee whose duties include policy-making or public contact is subject to a higher standard of caution regarding speech").

b. *Voigt's speech was disruptive*

It appears clear from the evidence presented that the Defendants' interests in promoting an effective workplace outweighed Voigt's First Amendment rights because Voigt's speech severely damaged office harmony and working relationships. Voigt, as Court Clerk and Assistant Area Court Administrator, needed to comply with a higher standard of caution regarding his speech and the possibility of its causing disruption. The fact that Voigt made his statements at the office in the course of his official duties also favors the Defendants' position that the speech endangered working relationships.

1) *affect of speech re Cramer hiring*

Voigt's criticism of Judith Cramer and of Judge Savell at the supervisors' meetings severely damaged office harmony and working relationships. The Defendants presented affidavits from three employees that were present at the meetings which reveal disruptive effects:

-- Frances Wagner, a pre-trial coordinator, stated that Voigt's comments made her angry at Cramer and Savell because she disliked the alleged preferential treatment and felt Savell had lied when he promised to hire the best person and someone who would advance the interests of the Fairbanks system. She believed Voigt's comments because she felt he was the only "link" to the higher administration. Consequently, she had less respect for Savell, Snowden and Chief Justice Rabinowitz, questioning their abilities. She also lacked confidence in Cramer and believed it would be difficult to work for her. *See* Wagner affidavit, Docket No. 112, Ex. Q. In her affidavit/memorandum to staff counsel Chris Christianson [sic], Wagner also stated "I felt it extremely strange that [Voigt] would try to deliberately turn us against not only the possible new ACA but also against Judge Savell." Docket No. 87, Ex. F.

-- Jo-Ann Grimaldi, the in-court clerks' supervisor, stated that following Voigt's

comments, she no longer believed Cramer to be qualified and felt that she would not be able to work for Cramer. Grimaldi also indicated that due to Voigt's comments re bias and favoritism she lost respect for Savell, Snowden and Rabinowitz and was so angry at Judge Savell that she no longer would speak to him. She also felt that she, as an employee of the Fairbanks Court System, would be treated as the "laughingstock of the state." *See* Grimaldi affidavit, Docket No. 112, Ex. R.

-- Etta Burgess, the transcript coordinator, stated that as a result of Voigt's comments at the meetings she lost respect for Voigt because she felt that he "shouldn't be trying to tear down people by statements to us." She also stated, "I believed he should have gone to the people he was talking about to air his grievances." *See* Burgess' affidavit, Docket No. 112, Ex. S.

As the affidavits make clear, Voigt's comments served to alienate the staff from the incoming ACA and lose respect for court administrators. As the Defendants point out, Voigt's criticism came at a bad time. The recent Sipes Report indicated office morale was extremely low and the work environment unpleasant. Voigt's comments inflamed an already volatile situation. Voigt's disclosure of Judge Hodges' memorandum to the newspaper further disrupted working relationships, since Judge Savell accused Hodges of

disclosing the memorandum. *See* Voigt deposition, Docket No. 87, Ex. A, p. 120.

Also, there is evidence that Voigt's comments triggered the division of court employees into two sides-- those friendly toward Judge Savell and those friendly with Voigt. Wagner indicated that Voigt had instructed the employees to go through him and not directly to Judge Savell with any problems they had. Docket No. 112, Ex. Q. The letter of intent also refers to Voigt's "edict" of forbidding employees from speaking with Judge Savell. Docket No. 101, Ex. Q-1, p. 3. As Crawford/Perron stated in her affidavit, Judge Savell indicated to her that she would have to "choose sides." Docket No. 101, Ex. F, p. 6. This divisive behavior, coupled with Voigt's sharp criticism of Judge Savell at the supervisor's meeting, reveals Voigt's insubordination and attempts to undermine Judge Savell's authority.

Voigt contends that if his speech regarding the Cramer hiring was as disruptive as Defendants allege it was, why did the Defendants wait until March 1992 to discharge Voigt? Voigt argues that since the Defendants chose only to issue a written reprimand, his behavior must not have been too disruptive. He contends that even if there was disruption among courthouse employees, the Defendants cannot prove that the disruption was the result of Voigt's exercise of free speech. He

notes that because the Sipes Report indicated that working relationships in Fairbanks were poor already, Defendants should not blame any continued disharmony on Voigt's criticism of the Cramer incident. He also notes that other employees at the supervisors' meeting expressed similar outrage over Savell's hiring decision.

Voigt's contentions do not vitiate Defendant's showing of disruption attributable to Voigt's speech. Voigt was under a higher standard than other employees to use caution in criticizing the actions of the presiding judge. Furthermore, Voigt's contentions do not raise disputed factual issues precluding summary judgment.

2) *affect of speech re Demoski grievance*

The facts presented show that Voigt alienated other court employees against Demoski by speaking to his subordinate supervisors about alleged discrimination by Savell and others. Voigt's discussions with others alleging that Savell was motivated by personal dislike for Voigt further undermined Savell's authority. As Jackson's investigation concluded, Voigt improperly gave Crawford/Perron's application preferential treatment. Consequently, his criticism of the grievance decision further evidenced a refusal to follow administrative policies.

Defendants also argue that disruption could be inferred from the fact that Voigt accused Judge Savell and Chief Justice Rabinowitz of unconstitutional discrimination, which would "question the very essence of their roles in the state judiciary" and "undermine their authority." Docket No. 112, p. 24.

c. *conclusion*

As it appears doubtful that Voigt's speech involved any matters of public concern in the first place, Defendants have a lower burden of showing that the balance of interests tipped in their favor. Even if a higher burden were required, the facts presented indicate that Voigt's speech caused substantial disruption at the courthouse. Certainly, a reasonable official could find that Voigt's speech damaged office harmony and working relationships to the extent that his speech, even if involving a matter of public concern, was not constitutionally protected. Consequently, even if the Court ultimately found that the balance tipped in Voigt's favor, qualified immunity would preclude the claim.

D. *Was the Protected Speech a Motivating Factor for the Discharge?*

Voigt not only fails to demonstrate that his speech was constitutionally protected, but

he also fails to satisfy the second element of a retaliatory discharge under § 1983, which is to show that his protected speech was the motivating factor behind the Defendants' decision to discharge Voigt. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Erickson v. Pierce County*, 960 F.2d 801, 804 (9th Cir. 1992).[27]

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[27] In *Erickson*, the plaintiff was a former employee in the county prosecutor's office. She had a romantic relationship with the former county prosecutor, William Griffies, while serving as his administrative assistant. When John Landenburg defeated Griffies as county prosecutor, Erickson continued working in the office in its family support unit. Landenburg later fired Erickson for her poor attitude, failure to cooperate, failure to complete assigned tasks, and for causing continuing morale problems. Erickson brought a § 1983 action alleging that Landenburg fired her solely because she had supported Griffies during his reelection campaign. The Ninth Circuit found that although Erickson satisfied the first element of her claim (protected conduct), she did not satisfy the second. Her list of nine disputed facts merely suggested that Erickson was a Griffies supporter who was terminated, not that she was terminated because she was a Griffies supporter. 960 F.2d at 805.

In a similar vein, this Court finds that although Voigt has shown that the Defendants disapproved of Voigt's criticism of the Cramer

The plaintiff need only prove that the protected speech was a "substantial" factor in the decision to terminate; it is not necessary to demonstrate that the dismissal was based solely on these activities. *McKinley*, 705 F.2d at 1115; *cf. Mt. Healthy*, 429 U.S. at 285-86.[28] Furthermore, the plaintiff may rely

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and Demoski grievances, he has not demonstrated that such criticism was the substantial reason for his termination.

[28] In *Mt. Healthy*, the Court articulated the third step in a retaliatory discharge claim -- that the defendant employer show that it would have terminated the employee regardless of the protected conduct. In its discussion, the Court rejected the notion that a plaintiff could prevail simply by showing that the protected conduct was a substantial factor in the termination. The Court explained as follows:

> A rule of causation which focuses solely on whether the protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. [Such a rule] would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on

on circumstantial evidence. *Erickson*, 960 F.2d at 805.

Voigt has not provided sufficient circumstantial evidence to raise an inference that any of the Defendants considered his comments regarding the Cramer or Demoski incidents as a substantial or motivating factor in the decision to terminate. He simply relies on the intent to dismiss letter to raise that inference because the letter mentioned both incidents. He contends that the Jackson interviews revealing other transgressions by Voigt occurred "after-the-fact" and immediately before his termination, implying that they were simply drummed up to give

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> the minds of those responsible for the decision to rehire, and does indeed play a part in that decision-- even if the same decision would have been reached had the incident not occurred. . . . [The plaintiff] ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 285-86.

extra substance to the letter. Finally, he objects to the letter's reference to "inappropriate statements to subordinate employees" as a basis for his discharge because Savell and Woods also made such statements, as evidence by the Crawford/Perron affidavit. Docket No. 101, pp. 30-32.

However, the facts show that there were many reasons for Voigt's discharge. Even though the intent to dismiss letter mentions both incidents, it also catalogs a long list of other inappropriate behavior. *See* footnote 1, *supra*. As the Defendants point out, the letter refers to the Cramer incident and subsequent written reprimand because the reprimand clearly warned Voigt that the administrators expected him to correct such deficient behavior. Docket No. 112, p. 25. Nevertheless, as two subsequent investigations by Jackson revealed, Voigt continued to exercise poor managerial judgment and to engage in divisive and inappropriate behavior. *See* relevant facts, Part III-A, *supra*. The Defendants correctly note that whether or not Savell and Woods made inappropriate statements to subordinate employees is irrelevant.

E. *Would the Defendants Have Discharged Voigt Regardless of His Protected Speech?*

Even if Voigt had provided sufficient evidence to raise inferences that his speech was constitutionally protected and that it was

a motivating factor behind his discharge, Voigt's retaliatory discharge claim would be thwarted if the Defendants could show by a preponderance of evidence that they would have discharged Voigt even if he had not engaged in the protected speech.[29] Mt. Healthy, 429 U.S. at 287. *See Hyland*, 972 F.2d at 1139 n.2. The facts in this case reveal that Voigt would have been fired regardless of his protected speech.

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[29] Voigt contends that the Defendants have essentially waived their right to rely on this argument for purposes of their motion for partial summary judgment. Docket No. 101, p. 33. He argues that because the Defendants failed to argue this "harmless error" test, once Voigt establishes a *prima facie* case, the Defendants are precluded from claiming they should still prevail on their motion for summary judgment because Voigt would have been fired anyway. *Id.* at 33. The Defendants do not address Voigt's contention or the "harmless error" test in their reply brief. Docket No. 112. It is not clear whether the Court can apply the test *sua sponte*. One could argue that the Ninth Circuit Court of Appeals has declined to consider the "harmless error" test when the defendants failed to make the argument. *See Hyland*, 972 F.2d at 1139 n.2; *but see Mt. Health*, 429 U.S. at 287 (remanded for consideration of harmless error test). This Court will follow *Mt. Healthy* and apply the test *sua sponte*.

The situation is analogous to that in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Doyle was a teacher who also served as president of the Teachers' Association in 1969 for a one-year term and then as a member of the executive committee for a succeeding year. Apparently, there was some tension between the Association and the Board of Education during this time. During this time, Doyle was involved in several incidents, including: 1) engaging in an argument with another teacher culminating in the other teacher's slapping Doyle; Doyle refused to accept an apology, insisting on punishment, and both teachers were suspended; this resulted in a walkout by other teachers; 2) engaging in an argument with cafeteria employees over the amount of spaghetti he received; 3) referring to students in a disciplinary complaint as "sons of bitches"; 4) making an obscene gesture to two girls when they failed to obey his commands as cafeteria supervisor; and finally 5) reporting to the local radio station the contents of the principal's memorandum to teachers relating to teachers' dress and appearance.

The Board refused to rehire the non-tenured Doyle, stating that Doyle had shown "a notable lack of tact in handling professional matters which leaves much doubt as to [Doyle's] sincerity in establishing good school relations." The Board specifically cited the radio incident and Doyle's use of

obscene gestures. The district court concluded that Doyle's disclosure to the radio station was protected speech and that the Board's statement revealed that the speech played a substantial part in the decision not to rehire Doyle; therefore he was entitled to reinstatement with back pay. The Supreme Court disagreed with the judgment and remanded for consideration of whether the Board had shown that it would have fired Doyle even in the absence of protected speech. The Court felt that the court should formulate a test of causation to distinguish between a result caused by a constitutional violation and one not so caused. The Court disagreed with the district court's approach because "it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision-- even if the same decision would have been reached had the incident not occurred." 429 U.S. at 285. *See* footnote 28, *supra*.

As mentioned already, the intent to dismiss letter listed many incidents revealing a lack of tact and professionalism on Voigt's part that is similar to the situation in *Mt. Healthy*. The written reprimand to Voigt and the subsequent investigations by Jackson evidence Voigt's shortcomings that would have justified his termination regardless of his protected speech. As the intent letter

stated, "We believe that, given your past performance, any one of the above cited reasons would justify your termination. Additionally, please be advised that the specific instances set forth herein and justifying your termination are intended as examples only and are not necessarily all inclusive." Docket No. 101, Ex. Q-1, p. 4. Consequently, under the "harmless error" test of causation, there is a preponderance of evidence that Voigt would have been fired even if he had not criticized the Cramer and Demoski incidents.

CONCLUSION

Voigt's § 1985(3) claim appears to be precluded by qualified immunity because the law was not so clearly established that a reasonable official would realize that discriminating against nonresident applicants for public employment would be invidious discrimination under § 1985(3). Even if it were and qualified immunity did not apply, Voigt's claim would be dismissed because Voigt has not produced sufficient evidence to raise an inference that a conspiracy existed in the first place or that its purpose was to invidiously discriminate against a protected class.

Voigt's § 1983 claims would also be precluded by qualified immunity because the law was not so clearly established that a reasonable official would realize that dis-

charging Voigt for his criticism of the Cramer and Demoski incidents would violate § 1983. A reasonable official would conclude that Voigt's speech was not constitutionally protected; it did not substantially involve any matters of public concern, and to the extent it did, the government's interest in promoting an effective workplace outweighed Voigt's First Amendment rights. Even if qualified immunity did not apply, the retaliatory discharge claims would be dismissed because Voigt has failed to show that the speech was a motivating factor in the Defendant's decision to discharge Voigt, and a preponderance of evidence reveals that Defendants would have fired Voigt regardless of the speech.

IT IS THEREFORE ORDERED:

The Court **GRANTS** Defendants' motion to accept the filing of the reply memorandum in excess of the permitted 25 pages at Docket No. 111.

Pending oral argument, the Court **TENTATIVELY GRANTS** Defendants' motion at Docket No. 87.

January 31, 1994 /s/ James K. Singleton, Jr.
DATE HONORABLE JAMES K. SINGLETON, JR.
United States District Court Judge
Anchorage, Alaska

Copies to:
Wickwire
Koziol
2-2-94 tpb

APPENDIX J

Supreme Court Rule 10 provides:

Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or

of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

APPENDIX K

(Voigt 3-93 Deposition Exhibit K)

M E M O R A N D U M January 17, 1991

TO: Presiding Judge Savell

FROM: J. Burk Voigt /s/ JBV
Clerk of Court

SUBJECT: Clarification of relationship

I am confused by your recent memos to me and feel that it is important to address what I see as the development of a very serious impediment to our relationship. In your memo of January 15, 1991, you state that you are "committed to open communication among and between all levels of the court system staff." You further write that you are "also committed to eliminating many of the serious shortcomings noted in the Sipes report." And, yet, in this same memo, you repeat what you have done to me in a number areas, you reprimand me for conduct ("a real blunder") that you haven't even given me the courtesy to address.

I am trying, and, even before you became the presiding judge, I have tried, to establish communication with you. I have come in mornings. I have copied all relevant correspondence to you. I have sought your opinion

in writing on numerous matters. I have agreed to meet with you regularly whenever and wherever it would be convenient for you. And despite my efforts, the most I have gotten are fleeting comments from you that we will talk later as you rush from one engagement to another. I certainly understand the pressures you are presently under trying to be a judge, the presiding judge, and the chief administrator for the district. This is why I tried to sit down and talk to you in November and again in early December to ascertain your expectations of me. All of my attempt at communication with you have been to no avail.

While I can proceed with courthouse relations as they were under the former presiding judge, I am perplexed by your statements about improving communications, work relationships and courthouse problems. These problems do not go away by not talking about them. You have demeaned my entire staff by your repeated assertions of morale problems in my office without specification. While your target may have been me personally, your indiscriminate and general comments deny the tremendous accomplishments my office has made with a significant reduction in personnel, an increase in responsibilities, an absence of any real automation support and a total failure of leadership from either the former presiding judge or ACA. The bias from which so many on the fourth floor suffer is revealed by the forced reading of Sipes report to imply

that problems in my office are unique from problems found generally in the entire courthouse. My office was not even mentioned by Ms. Sipes. A fair sampling of my staff (or even a total interview) has never been done despite my repeated invitations.

So many decisions seem to be based on nothing more than idle courthouse gossip. I am tired of being on the defensive for dealing with personnel problems too long ignored. The hours and days of my own time that I have given attempting to improve the operation of my office, as well as the entire courthouse, seem to have been totally misspent. As the ACA pointed out after his very critical evaluation of my first year's performance (to which no one rose in my defense), nobody asked me to do these extra things. Evidently I was misguided. Criticism seems plentiful, support rare.

Your distrust of me is evidenced by your repeated desire to take issue with my decisions within the Clerk's Office. For example, the decision to have orders and judgments processed within two days seems to particularly cause you problems, and yet this decision was a product of my supervisory staff's determination that it is in our best interest to promptly process these documents to reduce the time spent on inquires of status alone. You have apparently decided without input that this decision was made in a despotic manner in

disregard of the needs of my clerks. A true concern for my personnel would be better evidenced by a determination to secure more personnel or automation to allow them to better do the professional job they are striving to do. My past memos about personnel and automation needs have gone, and, evidently still are, going unheeded.

I have no problems with ACA matters being referred to Mac Gibson. The problem is that tasks and projects that were to have been completed months, if not years, ago, haven't been done. I think that it is this frustration that leads people both in Anchorage and Fairbanks to my door. I have been doing much of the ACA's work since I got here. Your apparent distrust that I will do "something", anything, beyond my station makes me wonder why you sent me instead of Mac to the recent ACA meeting. The question goes begging that if Mac is able to teach you as the new presiding judge so much, why are we "accepting his resignation"?

As I began, I am confused. Why I am considered by you to be the bad guy, I don't know. I don't know of anything that I have done to give you cause. Given this state, I am reluctant to exercise any real initiative. I have no problems restricting my scope to only those matters that directly affect the Clerk's Office. I would appreciate not being placed in the awkward position of representing

the district with Administration given your weariness of my abilities.

Please be assured that your displeasure with me has been adequately expressed. While I am not sure of the specific course of conduct you are prohibiting, I will make every effort not to repeat it.

APPENDIX L

M E M O R A N D U M February 25, 1992

TO: Roberta Demoski

INFO: Chief Justice Rabinowitz
Stephanie J. Cole, Deputy
Administrative Director
Karrold Jackson, Personnel Director
Ron Woods, Area Court Administrator
J. Burk Voigt, Clerk of Court

FROM: Presiding Judge Savell /s/ RDS

SUBJECT: Informal Grievance

(RECEIVED March 2, 1992, Office of Administrative Director, Alaska Court System)

On February 19, 1992, by fax transmission you appealed the February 14, 1992, decision of Ron Woods, ACA, denying your informal grievance arising from your recent applications for promotion/transfer from the Galena court to fill vacancies in the Fairbanks Clerk's Office. On February 21 and 24, 1992, you consented to an extension of the two working day time period for my decision.

Accompanying this memorandum is my written decision. For the reasons stated therein, I have found your grievance to be valid.

RDS:bjo
Encl.

GRIEVANCE DECISION

Roberta L. Demoski [Demoski], Clerk of Court in the Galena District Court, has informally grieved the decision of the Fairbanks Clerk of Courts passing her over for hire in the Fairbanks court for the position of Court Clerk I in the Records Department. In asserting her grievance, Demoski has also complained of statements made in the application and interview process which she underwent just prior to applying for the Court Clerk I position. In that application and interview process, she unsuccessfully applied for the position of Court Clerk II in the Fairbanks Criminal Department.

The Grievance

Demoski complains that, in discussing her unsuccessful bid for the Court Clerk II position with Burk Voigt [Voigt], Voigt justified his selection of the successful candidate on the basis of factors other than qualifications, length of service, and past performance evaluations. Specifically, she claims that Voigt explained that the successful candidate was selected because she had an outgoing personality. Demoski notes

that in a previous interview she had been told that a clerk from the Records Department was going to be applying for the upcoming opening in the Criminal Department and that this would create a vacancy in the Records Department. This, in fact, is what happened when the Criminal Department vacancy was filled with the applicant from the Records Department. This is the same applicant said by Voigt to have been selected, in part, because of her personality.

Demoski also complains that in each of her Fairbanks interviews the interviewers seemed overly concerned about being able to supervise a clerk from a bush court. She complains that this concern was unjustified in her case and shows a discriminatory predisposition against court system applicants seeking to transfer from bush locations.

Demoski complains that her experience, qualifications, length of service, and commitment to the court system were ignored. According to Demoski, Voigt told her that performance evaluations are an inaccurate indicator of an employee's performance because a supervisor who likes an employee will give false evaluations.

Demoski's grievance also identifies what she believes to be another discriminatory attitude toward bush clerks. According to Demoski, Voigt pointed to previous experience

with a clerk from a rural court who had lasted only two weeks on the job. He cautioned that Demoski might be surprised at being unable to keep up with the pace in Fairbanks.

Demoski recounts that in her discussions with Voigt after she was not selected for the Court Clerk II position, Voigt explained that it was his desire to start new Fairbanks clerks in the Records Department so that they could be transferred and promoted from there. Demoski notes that this is consistent with Voigt's earlier statement that there would be a vacancy in the Records Department after the Criminal Department position was filled. Voigt's statements suggest that the decision to hire Dana Evans [Evans] into the Criminal Department position was made before the formal application process even began.

Demoski complains that, while she was twice told how qualified she was for hire into the Records Department, these statements were only made in the context of her previous unsuccessful interviews. When the interview for the Records Department vacancy came, the position was given to an employee from outside of the court system and outside of the State of Alaska.

The Area Court Administrator's Response

This matter was first grieved to Ronald Woods, the Area Court Administrator. In the

process of his investigation of the grievance, Woods received a memorandum from Voigt in answer to Demoski's grievance. Voigt's memorandum asserted, with no detail or further explanation, that the selection of Evans into the position of Court Clerk II in the Criminal Department was based upon her experience, education, and personality, which he called "important considerations." Likewise, in explaining his choice of Margaret Crawford [Crawford] for the position of Court Clerk I, a position which found Demoski as the only applicant from within the court system, Voigt explained to Woods that three unidentified applicants were nominated and that Crawford was hired because of "the significant contribution a person with [her] legal experience and education as well as her first hand experience with our court and judges could make."

Significantly, Voigt did not dispute Demoski's rendition of their conversations. His only other substantive comment in discussing Demoski's unsuccessful attempts to obtain positions in the Fairbanks Clerk's Office cast doubt upon her interest in the position, implying instead that her sole motivation is to be able to move to Fairbanks.

On February 14, 1992, the Area Court Administrator denied Demoski's grievance. His denial recites that he conducted a "thorough, independent, and objective investigation" to

determine if any impropriety or discrimination occurred in the appointment process. He concluded that there was neither personnel rule violation nor any discriminatory act. He further concluded that the Alaska Court Systems' firm commitment to affirmative action standards and goals was not compromised. I conclude otherwise.

Discussion

A hallmark of non-discriminatory employment practices is the use of objective standards by which the relative qualifications of persons for a specific job can be evaluated. Voigt first ran afoul of these standards in his explanation for his selection of the Court Clerk II replacement. He stressed that his decision was based not upon qualification, experience, and length of service, but upon education and personality. He gave no explanation, nor did the Area Court Administrator apparently examine, whether these criteria were proper or how consideration of these criteria rendered Evans more qualified for the Court Clerk II position. As such, comparison of their applications is in order.

Demoski's application demonstrates experience and a familiarity with all aspects of the operation of the Clerk's Office in Galena which handles most of the types of matters found in the Fairbanks Clerk's Office,

albeit in less volume. Demoski has two and a half years of experience in a court clerk's office and ten years in the clerical field generally. Evans' last job with applicable skills before her 15 months of employment with the court system was in 1984-85. Demoski's application claims typing at 60 words per minute; Evans' shows 55-60. Measuring their qualifications under objective standards, Demoski already did more of and was more experienced at precisely what the job description called for.

According to Voigt, however, the decision was made based upon education and personality. As for education, Demoski and Evans both had college credits but no degree. Demoski had studied business and contract law; Evans had taken business and education courses. As will also be discussed regarding the selection of Crawford, the measure of one's qualifications for a particular position, be it Court Clerk II or Court Clerk I, is not one's potential to hold other jobs in the future or one's past (and laudable) educational pursuits that do not bear upon the performance requirements for the specific job.

More troubling, however, is the explanation, given more than one time, that the successful applicant for the Court Clerk II position was chosen for her outgoing personality. Whether intentional or not, this use of personality as a determining factor

cannot withstand challenge. While neutral on its face, this attribute is highly subjective and would have an adverse impact upon Alaska Natives generally. Alaska Natives are found, as a culture, to be more reticent, subdued, and therefore less likely to have the outgoing personality sought by Voigt. For this reason Woods' conclusion that the court system's affirmative action concepts were not compromised is in error.

Equally troubling are other of Voigt's statements. As Demoski notes, Voigt's earlier statement that a vacancy in the Criminal Department would result in a vacancy in the Records Department gives rise to an inference that the application process was a sham and that Evans' selection to fill the position was a foregone conclusion. There was no evidence offered by Voigt, nor does it appear that evidence was sought or obtained by Woods, to rebut this inference. Voigt was entitled to consider Evans' experience in the Records Department in evaluating her qualifications for the Court Clerk II position; however, he cannot use the Records Department as a prerequisite to becoming a Court Clerk II.

Focusing upon the Court Clerk I position, the only explanation Voigt has given for his selection was his expectation that Crawford could make a "significant contribution" because of her "legal experience and education as well as first-hand experience with our

court and judges." As previously noted, under the court system's hiring procedures, the test for selection is not one's future potential. Voigt was unjustified in concluding that because Crawford had been to law school and had worked on the fourth floor for a superior court judge, that she was most qualified for an entry level Court Clerk I position in the Records Department.

It is apparent that Crawford's education could not have been the main reason she was selected. After all, Evans had been selected over Crawford and Demoski for the Court Clerk II position. Whatever deemed Evans more qualified than Crawford and Demoski could not have been her education and experience, because Crawford had more education and Demoski had more experience. I have attempted without success to see what qualifications Evans had that both Crawford and Demoski lacked. I could find none.

I have compared Crawford's and Demoski's respective applications and measured them against the position description to determine in which of the job's requirements Crawford stood superior to Demoski. I could find none. Examination of Crawford's and Demoski's applications and the position description leads to the conclusion that Voigt's decision cannot be upheld under our personnel practices.

The Court Clerk I position involves standardized clerical work under the direct supervision of a higher level clerical employee. The Court Clerk I does not supervise others. It is an entry level position performing the more standardized clerical functions in connection with processing case files. Unusual problems or questions are generally referred to a superior.

There is little complexity in the work, as it fits within well-defined practices and policies. There is little independent judgment involved. The procedures and directions are specifically defined within the limits of established policy and procedure.

Important qualifications include knowledge of current office procedures, skill in filing and typing, abilities and experience in standard clerical work, knowledge of court procedures and the operation of the Clerk's Office, a high school diploma, and a year of general office clerical work experience.

Against these qualifications must be measured Demoski's application and that of Crawford. Both applicants have education over and above the high school diploma. Crawford has a law degree. Demoski lists her ability to operate every type of machine found within the court system; Crawford lists none. Demoski types 60 words per minute; Crawford

only 45. Demoski lists the specific duties in her current job which match and even exceed those for the position she was seeking; Crawford lists none, although she can be assumed to be familiar with court rules of procedure. Demoski shows ten years of clerical experience, capped most recently with two and a half years as Court Clerk in Galena. In the last two and a half years Crawford has been a law clerk, a student, and a practicing lawyer.

Demoski was and remains fully capable to enter into the job and be immediately able to perform most of its functions. The same cannot be said for Crawford, whose application indicates she performed clerical duties incidental to her professional or technical duties. Voigt drew a negative inference from Demoski's desire to relocate to Fairbanks. Ironically, this was also the reason given by Crawford for leaving her last employment.

Conclusion

Based on the foregoing, I conclude that Demoski's grievance is valid. Qualifications for the job at issue were ignored for what were considered more lofty or valuable characteristics. Improper standards were applied, demonstrating a presumption that clerks from small rural courts cannot, as a rule, meet the demands of the Fairbanks Clerk's Office. Voigt imposed an unwritten

and subjective personality requirement that is potentially discriminatory in its application. The merit system and performance evaluation process, the backbone of a fair personnel system, appears to have been discounted.

Margaret Crawford was my law clerk. I am fond of her and admire her abilities. I am pleased that she returned to Fairbanks. But those factors can have no bearing on the analysis of Demoski's grievance.

Because Voigt relied upon improper criteria in his treatment of Demoski, participated in a process giving an appearance that the selection was a foregone conclusion, applied impermissible factors, and ignored the preference due Demoski under Personnel Rule 3.13.02, the grievance is upheld. A remedy must be fashioned to give Demoski a transfer to the Fairbanks Clerk's Office, into the first available position for which she is qualified.

DATED at Fairbanks, Alaska, this 25 day of February, 1992.

/s/ Richard D. Savell
RICHARD D. SAVELL
Presiding Judge

APPENDIX M

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Anchorage, Alaska 99501
(907) 258-7706

Counsel for Defendants Richard D. Savell, Ronald J. Woods, Karrold Jackson, and State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT, Plaintiff, vs. RICHARD D. SAVELL, RONALD J. WOODS, WOODS, KARROLD JACKSON, and STATE OF ALASKA, Defendants.	Case No. F92-012 Civil Affidavit of Etta L. Burgess

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

Etta L. Burgess, being first duly sworn upon her oath, deposes and states:

1. My name is Etta L. Burgess and I am a Transcriber II, Alaska Court System, Fairbanks.

2. I prepared the attached memorandum dated May 28, 1992.

3. The facts set forth in this memorandum are true and accurate to the best of my recollection and the opinions set forth in the memorandum are my own opinions.

4. FURTHERMORE, your affiant saith naught.

/s/ Etta Burgess
(Name)

SUBSCRIBED AND SWORN TO before me this 1st day of June, 1992.

/s/ Donna Holleman
Notary Public in and for Alaska
My Commission expires: upon termination

M E M O R A N D U M May 28, 1992

TO: C.S. Christensen III
Staff Counsel

FROM: Etta L. Burgess /s/ ELB
Transcript Coordinator

SUBJECT: Request for affidavit information

As you requested in our phone conversation today, this is what I recall of a supervisor's staff meeting called by J. Burk Voigt sometime in the month of April 1991:

It was during such meeting that he was bringing us up to date regarding the status of the filling of the position of the Area Court Administrator. Comments made by him were very disparaging* both toward Judge Savell and Judith Cramer. He surmised* that Judith was being considered/selected because of her acquaintance with Art Snowden and that because of this she would have an "in" with administration thus putting Fairbanks in a favorable light regarding needs for the Fourth District. His insinuations continued along the same line when mentioning that Judge Savell and Justice Rabinowtiz were entertaining her with lunch and personal attention that hadn't been afforded the other candidates.

Although I don't recall exact language used by him nor all that was said, which was effusive*, I do recall his comments about

Judge Savell and the situation were belittling* and vindictive*. I believed then and still do now, that however strongly he felt about it they were comments completely out of line in the setting and to whom they were being made.

*Words I have intentionally selected

APPENDIX N

FRANK S. KOZIOL, ESQ.
Attorney at Law
618 Christensen Drive
Anchorage, Alaska 99501
(907) 258-7706

Counsel for Defendants Richard D. Savell, Ronald J. Woods, Karrold Jackson, and State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT, Plaintiff, vs. RICHARD D. SAVELL, RONALD J. WOODS, WOODS, KARROLD JACKSON, and STATE OF ALASKA, Defendants.	Case No. F92-012 Civil Affidavit of JO-ANN GRIMALDI

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

JO-ANN GRIMALDI, being first duly sworn upon her oath, deposes and states:

1. My name is JO-ANN GRIMALDI and I am the IN-COURT CLERK SUPERVISOR.

2. I prepared the attached memorandum dated MAY 28, 1992.

3. The facts set forth in this memorandum are true and accurate to the best of my recollection and the opinions set forth in the memorandum are my own opinions.

4. FURTHERMORE, your affiant saith naught.

/s/ Jo-Ann Grimaldi
(Name)

SUBSCRIBED AND SWORN TO before me this 1st day of June, 1992.

/s/ Deborah M. Kolland
Notary Public in and for Alaska
My Commission expires: upon termination

M E M O R A N D U M

May 28, 1992

To: C. S. Christensen III
Staff Counsel

From: Jo-Ann Grimaldi /s/ JG 6-2-92
Supervisor, In-Court Clerks

Subject: Affidavit Information; Voigt Lawsuit

Per the Savell/Crammer [sic]/Mills incident of 1991, I will attempt to paraphrase just what I can recall of the information given to me by Burk Voigt. The information I will list was more than likely told to me in a general staff meeting, but there is a slight chance that I was told some facts in other conversations with Mr. Voigt.

All supervisors were called to a staff meeting in the juryroom for courtroom #C. This meeting was called to inform us of the rocky situation that Judge Savell had put the Fairbanks Court System in, ie, a possible lawsuit from Mr. Don Mills.

We were all aware of who the applicants were for the ACA position, we were told via memo that Judith Cramer had been hired.

Burk Voigt had informed us that Judge Savell had been in California wining and dinning [sic] Ms. Cramer. Burk informed us that the

hiring of Ms. Cramer was against the advise [sic] of himself and some of the Fairbanks judges. Burk stated that the judges who had worked for Ms. Cramer found her unqualified for the job and they would not recommend her for the Fairbanks position. Statements were made to the effect that Chief Justice Rabinowitz ordered Judge Savell to hire Ms. Cramer, it was told that Justice Rabinowitz had taken Ms. Cramer to lunch and found her to be the perfect applicant for the job.

I am unsure if it was at a meeting, but I have recollection of being told that Donald Mills would have been the best person for the ACA job, because Ms. Cramer would only unite all the female judges against the male judges and as it was there was too much friction already, especially on the fourth floor.

At some point later we again had a meeting and we were told of the "fiasco" that Judge Savell had caused, we were told that Ms. Cramer declined the job after accepting it. Mr. Mills was then hired, Ms. Cramer again called and said she wanted the job, Judge Savell was told by Art Snowden to re-hire her and un-hire Mr. Mills. It was said that the hiring on a Friday and firing on a Monday of Don Mills was the most unethical, unprofessional thing that was ever done. We were told that if we as supervisors had ever done such a thing we would be suspended or fired. There were no words to fully express just how horrible this

deed was, pure shame was brought to the Fairbanks Court System. We were told that Mr. Mills had quit his job, so had his wife, sold his home, there had even been a farewell party from the community, we could expect a lawsuit to be filed, for breach of contract. The State would end up paying for the humiliation caused to Mr. Mills. The handling of the situation by Savell showed total lack of feeling for Mr. Mills, caused the Fairbanks Court System to become a laughing stock, showed us to be totally unreliable in anything we did or said. No-one would ever trust us again.

APPENDIX O

FRANK S. KOZIOL, ESQ.
Attorney at Law
618 Christensen Drive
Anchorage, Alaska 99501
(907) 258-7706

Counsel for Defendants Richard D. Savell, Ronald J. Woods, Karrold Jackson, and State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT, Plaintiff, vs. RICHARD D. SAVELL, RONALD J. WOODS, WOODS, KARROLD JACKSON, and STATE OF ALASKA, Defendants.	Case No. F92-012 Civil Affidavit of Brenda J. Richard

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

Brenda J. Richard, being first duly sworn upon her oath, deposes and states:

1. My name is Brenda J. Richard and I am the Fairbanks Jury Clerk for the State of Alaska.

2. I prepared the attached memorandum dated May 29th, 1992.

3. The facts set forth in this memorandum are true and accurate to the best of my recollection and the opinions set forth in the memorandum are my own opinions.

4. FURTHERMORE, your affiant saith naught.

/s/ Brenda J. Richard
(Name)

SUBSCRIBED AND SWORN TO before me this 1st day of June, 1992.

/s/ Donna Holleman
Notary Public in and for Alaska
My Commission expires: upon termination

MEMORANDUM Alaska Court System

TO:
Chris Christensen
264-8228

DATE: May 29, 1992

FROM:
Brenda Richard
Fairbanks Jury
Clerk
/s/ Brenda

SUBJECT: Supervisor's Meetings

My name is Brenda J. Richard and I attended many supervisor's meetings during the time that Judy Kramer [sic] and Don Mills were hired for the Area Court Administrator's position. These meetings were lead by Burk Voigt who was the Acting Area Court Administrator at that time.

During one those meetings Burk did state that he thought that it was unethical for Judge Savell to fire Mr. Mills and hire Judy Kramer [sic]. He felt that she had turned the position down and should not have been reconsidered after the job had been filled. He stated that Don Mills had already had a garage sale and that he had talked to a Realtor about selling his house. Many other people at the meeting also voiced these same feelings.

He also expressed his concern about where her loyalty would be since she had some ties to Administration. It was brought up that she

was a friend of Art Snowden and that she was the only candidate that Art had taken to lunch.

Many other comments and concerns were voiced at these meetings, but it was quite awhile ago and some of it is vague. I do remember thinking that the meetings had a negative tone and suggested at one point that we look on the positive side and continue on. Burk agreed and we went on to another topic.

If you have any further question you can contact me.

APPENDIX P

FRANK S. KOZIOL, ESQ.
Attorney at Law
618 Christensen Drive
Anchorage, Alaska 99501
(907) 258-7706

Counsel for Defendants Richard D. Savell, Ronald J. Woods, Karrold Jackson, and State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J. BURK VOIGT, Plaintiff, vs. RICHARD D. SAVELL, RONALD J. WOODS, WOODS, KARROLD JACKSON, and STATE OF ALASKA, Defendants.	Case No. F92-012 Civil Affidavit of FRANCES R. WAGNER

STATE OF ALASKA)
) ss.
FOURTH JUDICIAL DISTRICT)

FRANCES R. WAGNER, being first duly sworn upon her oath, deposes and states:

1. My name is FRANCES R. WAGNER and I am the PRETRIAL SERVICES COORDINATOR.

2. I prepared the attached memorandum dated May 29, 1992.

3. The facts set forth in this memorandum are true and accurate to the best of my recollection and the opinions set forth in the memorandum are my own opinions.

4. FURTHERMORE, your affiant saith naught.

/s/ Frances R. Wagner
(Name)

SUBSCRIBED AND SWORN TO before me this 01st day of June, 1992.

/s/ Janice S. Merton
My Commission
expires: w/ office
Deputy Clerk of Court
Fourth Judicial District
Fairbanks, AK

TO: Chris Christianson, Staff Counsel

FROM: Frances R. Wagner, Pretrial Coordinator /s/ FW

DATE: May 29, 1992

SUBJECT: Affidavit RE: J. Burke [sic] Voigt

The following is a synopsis of my recollections of a meeting that took place about the first week of May 1991. After Mac Gibson left his possession [sic], Burke [sic] was acting ACA. For whatever reason, he started having weekly meetings with all of us that were considered ACA staff. Most of those meetings were attended by the following; Mary Jo Carr, Craig Simonson, Peggy Barneby, Arly Borjesson, Thekla Johnson, Cindy Brown, JoAnn [sic] Grimaldi, Brenda Richards [sic], Alicia Thompson and a representative from Probate. For several meetings prior to the one in question much discussion took place, from the termination of Mac to the hiring process of a new ACA. It was quite obvious that Burke [sic] had his favorites. At the meeting of early May the topic again turned to replacements for Mac. Burke [sic] stated that the selection had been badly handled from the beginning and very unprofessional, and that Judge Savell didn't know what he was doing. He stated that he had heard that Ms. Cramer had no support from the Judges she was currently working for. He felt the "fix" was on because she knew Art Snowdon [sic] prior to applying for this possession [sic]. She was

the only one of the candidates that was "afforded" lunch with the Chief Justice. He stated great concern that there was no chance for Fairbanks to get good representation because of her ties with Art Snowdon [sic]. Judge Savell and the entire process were spoken of in a constant negative attitude by Burke. He told us how Mr. Mills, after accepting the position, had resigned his current job, sold his house and was ready to move to Alaska when he was notified that Mr. [sic] Cramer was going to take the position. I felt it extremely strange that he would try to deliberately turn us against not only the possible new ACA but also Judge Savell. After much discussion one employee finally stated what was on the minds of most of us and that was she felt there was too much negative talk and we should have a "wait and see" attitude and give Ms. Cramer a chance to prove her own worth. At that point Burke did an excellent job of "back peddling" and of course agreed with the rest of us.